

JEFFREY M. SHOHET (Bar No. 067529)
JULIE L. HUSSEY (Bar No. 237711)
CARRIE S. DOLTON (Bar No. 234298)
DLA PIPER US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

Attorneys for Defendant
TIME WARNER ENTERTAINMENT-ADVANCE/
NEWHOUSE PARTNERSHIP, A NEW YORK GENERAL
PARTNERSHIP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LEON ALPERT, an individual, on behalf of
himself, on behalf of all those similarly
situated, and on behalf of the general public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a Delaware
corporation, and DOES 1 to 100,

Defendants.

Case No. 08 CV 0582 BTM WMc

NOTICE OF ERRATA

Judge: Hon. Barry Ted Moskowitz
Ctvm: 15

TO THE CLERK OF THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the signed Stipulated Protective Order attached hereto as Exhibit A was inadvertently omitted from the Superior Court file that was attached as Exhibit A to the Removal filed by Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a New York general partnership ("TWC") on March 27, 2008.

The documents attached as Exhibit B were received by TWC after filing its Removal. Specifically, attached are conformed copies of TWC's opposition to Plaintiff's motion to compel further responses to interrogatories and TWC's opposition to Plaintiff's renewed motion to compel further responses, which were received from the Superior Court after filing its Removal; and copies of Plaintiff's reply in support of motion to compel further responses to interrogatories

1 and Plaintiff's reply in support of renewed motion to compel further responses, which Plaintiff
2 filed with the Superior Court after TWC filed its Removal.

3 TWC hereby submits these documents so the Superior Court file is full and complete.

4 Dated: April 10, 2008

5 By s/Julie L. Hussey

6 JULIE L. HUSSEY
7 DLA PIPER US LLP
8 Attorneys for Defendant
9 Time Warner Entertainment-Advance/Newhouse
10 Partnership, A New York General Partnership
11 Email: julie.hussey@dlapiper.com
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Exhibits

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EXHIBIT A

COPY**F I L E D**
Clerk of the Court

MAR 21 2008

By: Y. STOLARSKY

JEFFREY M. SHOHET (Bar No. 067529)
JULIE L. HUSSEY (Bar No. 237711)
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DLA PIPER US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

Attorneys for Defendant
TIME WARNER ENTERTAINMENT-ADVANCE/
NEWHOUSE PARTNERSHIP, A NEW YORK
GENERAL PARTNERSHIP, THROUGH ITS SAN
DIEGO DIVISION, DBA TIME WARNER CABLE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL DIVISION

LEON ALPERT, an individual, on behalf
of himself, on behalf of all those similarly
situated, and on behalf of the general
public,

Plaintiff,

v.

TIME WARNER CABLE, INC., a
Delaware corporation, and DOES 1 TO
100,

Defendants.

CASE NO. GIC881621

**STIPULATED ~~PROPOSED~~
PROTECTIVE ORDER**

Dept: 63

Judge: Luis R. Vargas

1 Plaintiff LEON ALPERT ("Plaintiff") and named Defendant TIME WARNER
 2 ENTERTAINMENT-ADVANCE/ NEWHOUSE PARTNERSHIP, a New York General
 3 Partnership ("Defendant"), (collectively, the "Parties") assert that they may possess confidential
 4 information in the form of trade secrets or other confidential and/or proprietary business, personal
 5 and/or technical information related to the subject matter of this litigation and that it may be
 6 necessary to disclose such materials during the course of this litigation. However, the Parties
 7 desire to limit disclosure and prevent the use or misuse of such information for purposes other
 8 than the prosecution and defense of this action.

9 Subject to the California Rules of Court, as well as the California Code of Civil
 10 Procedure, the Parties, by and through their respective counsel of record hereby stipulate and
 11 agree to the request, and entry of, the following Protective Order ("Order"). The Parties hereby
 12 stipulate and agree that any findings made by the Court pursuant to this Order shall be made
 13 pursuant to Rules of Court 2.550 and 2.551. Consequently, no court proceedings or court
 14 transcripts may be sealed in advance pursuant to the Parties' stipulations, alone. Furthermore, the
 15 parties stipulate and agree that this Order shall not bind third parties to this action nor bind any
 16 other court.

17 Good cause exists for the Court to enter this Order because the property and privacy
 18 interests of the Parties outweighs the public's interest in full and complete access to judicial
 19 proceedings and because this Order provides a mechanism by which any Party or interested
 20 member of the public may challenge a confidentiality designation.

21 Accordingly, to expedite discovery and pursuant to the stipulation of counsel, and good
 22 cause having been shown, the Court hereby ORDERS as follows:

23 1. Confidential Materials: At the time of production or disclosure of any documents,
 24 discovery responses, testimony, data or other materials, or portions thereof, by any party
 25 believing that said materials contain proprietary, trade secret and/or confidential information
 26 (hereafter "the Producing Party"), the Producing Party may designate the materials as being
 27 subject to this Order by affixing a legend to the materials indicating that said material was
 28 produced in this case as "CONFIDENTIAL" or "CONFIDENTIAL—ATTORNEYS EYES

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ONLY" material which shall be subject to the terms of this Order (hereafter "Protected Materials").

2. Designation and Access to Protected Materials: Production of Protected Materials shall be subject to the following terms and conditions:

A. All documents and/or materials subject to the terms of this Order shall be clearly marked by the Producing Party in the manner specified in Paragraph 1 above; the marking will be done, insofar as practicable, in a way that does not render illegible the substantive portions of the documents containing Protected Materials;

B. Protected Materials shall only be used in the litigation of this case and any trial or post-trial proceedings in this case and for no other purpose(s) whatsoever and shall not be used by anyone subject to the terms of this Order for any business, commercial, or competitive purposes. Production of Protected Materials in this action shall not operate as a waiver of the Parties' confidentiality over the Protected Materials.

C. Confidential Material: Designation of "CONFIDENTIAL" Protected Materials shall be limited to materials that, in a good faith determination by the Producing Party and its counsel, contain proprietary, trade secret and/or confidential information not otherwise available to the public. Access to CONFIDENTIAL Protected Materials, and the information contained therein (including extracts, copies, notes, and summaries derived from them), shall be restricted to the following:

i. The parties, attorneys of record in this case and personnel assisting and supporting those attorneys in their work in this case (which specifically includes partners, associates and employees of the firm as well as outside attorney services whose assistance is required in the preparation of this case for trial);

ii. Those agents of the party, or other consulted professionals, including attorneys, whose assistance is required in the preparation of this case for trial and who must have access to the material to render assistance in that preparation;

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1 iii. Experts or consultants retained or consulted in connection with the
2 preparation or trial that have executed the Acknowledgement attached hereto as Exhibit A
3 (hereafter "Acknowledgement");

4 iv. Any individual who is indicated as an author or wrote the document
5 or information in issue; or any individual who is indicated as a recipient of the document or
6 information in issue;

7 v. Such other persons as counsel for the Producing Party may
8 authorize in writing, or as ordered by the Court;

9 vi. Any court reporter or videographer reporting a deposition in this
10 action, and;

11 vii. The Court and court personnel, including stenographic reporters
12 engaged in such proceedings, as are necessarily incident to the handling, preparation or pre-trial
13 hearings of this case.

14 D. Confidential—Attorneys-Eyes Only Materials: Designation of
15 "CONFIDENTIAL—ATTORNEYS EYES ONLY" Protected Materials shall be limited to
16 materials that, in a good faith determination by the Producing Party and its counsel, contain
17 proprietary, trade secret and/or confidential information not otherwise available to the public and
18 which the Producing Party reasonably believes would cause competitive injury to the Producing
19 Party if such information were to be disclosed to the other party or others, thus warranting that
20 disclosure be further limited as set forth herein. Access to "CONFIDENTIAL—ATTORNEYS
21 EYES ONLY" Protected Materials, and the information contained therein (including extracts,
22 copies, notes, and summaries derived from them), shall be restricted to the following:

23 i. Outside counsel of record in this case and personnel assisting and
24 supporting those attorneys in their work in this case (which specifically includes partners,
25 associates and employees of the firm as well as outside attorney services whose assistance is
26 required in the preparation of this case for trial);

27 ii. Experts or consultants retained or consulted in connection with the
28 preparation or trial that have executed the Acknowledgement attached hereto as Exhibit A;

1 iii. Any deponent who has authored or wrote the document or
2 information in issue; or any deponent who is indicated as a recipient of the document or
3 information in issue;

4 iv. Such other persons as counsel for the Producing Party may
5 authorize in writing, or as ordered by the Court;

6 v. Any court reporter or videographer reporting a deposition in this
7 action, and;

8 vi. The Court and court personnel, including stenographic reporters
9 engaged in such proceedings, as are necessarily incident to the handling, preparation or pre-trial
10 hearings of this case.

11 E. The parties to whom such Protected Materials are made available will not
12 disclose, directly or indirectly, the specific contents of the Protected Materials produced herein
13 (including extracts, copies, notes, and summaries derived from them) to anyone except those
14 persons identified in Paragraphs C and D, immediately above.

15 F. It shall be the duty of counsel receiving such Protected Materials, prior to
16 its disclosure to those permitted to receive it under this Order, to instruct those persons as to the
17 confidentiality of such Protected Materials and the terms of this Order; before any such person
18 shall receive any Protected Materials produced in this case, each such person shall be required to
19 read this Order and agree in writing, in the Acknowledgment attached hereto as Exhibit A, to be
20 bound by each of the terms of this Order.

21 3. Use of Protected Materials Subject to Protective Order: All information contained
22 in Protected Materials produced pursuant to this Order, including all information derived there
23 from, shall be used only for the purposes of this litigation and any trial or post-trial proceedings in
24 this case and for no other purpose(s) whatsoever.

25 A. Use of Protected Materials at Deposition: Counsel shall not disclose
26 Protected Material to a witness testifying at a deposition except in strict conformity with the
27 provisions of this Order or unless the party producing the Protected Materials assents to the
28 disclosure of such information in writing or on the record of the deposition.

- 1 i. Designation of Protected Materials at Deposition: To designate a
2 portion or an entire deposition transcript as subject to this Order, counsel may either (a) request
3 on the record, or (b) request within fourteen (14) days of receipt of the transcript of the
4 deposition, that the information disclosed be designated as CONFIDENTIAL or
5 CONFIDENTIAL—ATTORNEYS EYES ONLY as appropriate and considered subject to this
6 Order. Pending such designation by counsel, the entire deposition transcript, including exhibits,
7 shall be deemed “CONFIDENTIAL,” except for those portions of the transcript which counsel
8 previously designated as “CONFIDENTIAL—ATTORNEYS EYES ONLY.” At the expiration
9 of the fourteen (14) day designation period, only the pertinent pages of the deposition transcript
10 or exhibits so designated will be treated as Protected Materials and will be utilized only as
11 permitted by this Order, unless otherwise ordered by the Court.
- 12 ii. Attendance at Depositions: In the event that questions asked or
13 responses provided during depositions require the disclosure of Protected Materials, or if any
14 party desires to make an inquiry into Protected Materials, the attorney shall make such inquiry
15 only in the presence of those persons authorized to access such information under this Order and
16 counsel shall have the right to exclude from oral deposition any person who is not authorized by
17 this Order to receive said information. Such right of exclusion shall be applicable only during the
18 period where such Protected Materials are being discussed.
- 19 iii. Treatment of Confidential Material During Inspection of
20 Documents: It is contemplated that a party may make certain files and/or documents available for
21 inspection by the other party, which files may contain confidential material, and that following
22 such inspection, the inspecting party may designate certain documents and/or materials to be
23 copied and produced. All documents and their contents made available for such inspection shall
24 be treated as “CONFIDENTIAL—ATTORNEYS’ EYES ONLY” Protected Materials for a
25 period of fourteen (14) days after said inspection to permit the producing party reasonable time to
26 designate and mark those documents which were requested to be produced as either
27 “CONFIDENTIAL” or “CONFIDENTIAL—ATTORNEYS EYES ONLY” pursuant to the terms
28 of this Order.

1 4. Subsequent Designation of Protected Material: In the event a party inadvertently
2 fails to stamp or otherwise designate any document, discovery response, summary, testimony or
3 any other material as Protected Materials, such failure shall not operate as a waiver and said party
4 may, as soon as practicable after disclosure, or receipt of the deposition transcript, designate such
5 information as Protected Materials by giving written notice to all parties. Under such
6 circumstances, however, no receiving party shall have any obligation or liability due to any
7 disclosure of the information which occurred prior to receipt of such notice; provided, however,
8 any subsequent disclosures shall be in accordance with such designations and this Order.

9 5. Filing of Protected Materials: Any item(s) designated as Protected Materials, and
10 any memorandum or document(s) purporting to reproduce or reveal the contents of such
11 Protected Materials, that a party intends to file or lodge with the Court will be filed or lodged
12 under seal in accordance with the following procedure:

13 A. Any party contemplating the filing or use of Protected Materials in a Court
14 proceeding, including trial, other than an ex parte application, shall do so in accordance with
15 California Rule of Court 2.550—2.551, and pursuant to any local rules;

16 B. Whereafter, the Producing Party shall have ten (10) days pursuant to
17 California Rule of Court 2.551 from the date of receipt of written notice that Protected Material
18 will be filed with the Court, to file a motion or an application to obtain an Order sealing the filing
19 of such Protected Materials in accordance with California Rule of Court 2.551;

20 C. No Protected Materials will be filed with the Court, other than in
21 connection with an ex parte application (the procedure for which is specified in paragraph D,
22 immediately below), without adherence to the procedure set forth in California Rules of Court
23 2.550 and 2.551;

24 D. In the event of an ex parte application requiring the Court's consideration
25 of Protected Materials, the moving party will give written notice to the producing party of the
26 intended use of the Protected Materials and either: (a) will not, in its application, produce or
27 reveal the contents of the Protected Materials, or (b) will lodge the Protected Materials in strict
28 accordance with the procedure specified in California Rules of Court 2.551.

1 E. Outside counsel of record for the parties shall have the right to access the
2 Court's files in this case, including materials which have been designated as "CONFIDENTIAL"
3 or "CONFIDENTIAL—ATTORNEYS EYES ONLY." Counsel of record may provide written
4 authorization to an attorney service to access and copy the entire file in this case, including
5 materials which have been filed under seal. The Clerk is directed and authorized to allow access
6 to such attorney service upon presentation of such written authorization.

7 6. Pretrial Application Only: This Order shall apply only to pretrial discovery. If the
8 case proceeds to trial, the parties shall raise any issues related to the handling of Protected
9 Materials with the Court at the Trial Readiness Conference and the Court will determine the
10 procedures to be followed regarding the handling of Protected Materials at trial.

11 7. Court Proceedings: Nothing herein shall be construed to prejudice any party's
12 right to use before the Court any Protected Materials. However, before doing so, to the extent not
13 otherwise authorized to be so used hereunder, the party intending to use Protected Materials shall
14 so inform the Court, and any party may apply to the Court for appropriate protection, including
15 clearing of the hearing room or courtroom of persons not entitled to receive Protected Materials
16 as authorized herein.

17 A. Admissibility and Objections: This Order shall not constitute a waiver of
18 any party's or non-party's right to object to the admissibility into evidence of any Protected
19 Materials as provided by California and/or Federal law. Nothing in this Order shall prejudice the
20 right of a party to (a) object to a request on any ground; (b) seek additional protective treatment
21 for any information; (c) object to the designation of any document as Protected Materials or (d)
22 seek any modification of or relief from any provision of this Order. Nothing in this Order shall
23 abridge the rights of any party to seek judicial review or to pursue other appropriate judicial
24 action with respect to any ruling made by the Court concerning issues of the status of Protected
25 Materials.

26 8. Meet and Confer: Prior to filing any motion or application to enforce this Order or
27 to challenge the designation of Protected Materials, the moving party shall notify the responding
28 party in writing and meet and confer in good faith in an attempt to resolve the dispute(s).

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9. Challenge to Confidential Designations: If a party objects to the designation of any documents, information, materials and/or deposition testimony as CONFIDENTIAL or CONFIDENTIAL—ATTORNEYS EYES ONLY, that party shall state its objection and the basis therefore in writing to the Producing Party's counsel, and shall maintain the confidentiality of the information unless and until the dispute is resolved by agreement of counsel or court order. Counsel for the parties shall meet and confer within five (5) days after receipt of such written objection in an effort to resolve any such dispute. If counsel are unable to resolve the dispute, it shall be the obligation of the Producing Party to seek a court order resolving the dispute within ten (10) days after the meet and confer process has concluded. The burden of proof will be on the Producing Party seeking protection for the materials in question. The confidential status of the information in dispute shall be maintained until service of a final court order resolving the dispute. Documents already produced in this litigation (i.e., before the execution of this Protective Order) are subject to the terms of this Order. Plaintiff retains his right to object to the confidential designation of previously produced documents and may object to such designation as outlined within this paragraph within ten (10) days of execution of this order by counsel.

10. Disclosure to Unauthorized Persons: If information subject to this Order is disclosed to any unauthorized person either through inadvertence, mistake or otherwise without authorization by the designating party, or other than in a manner authorized by this Order, the person responsible for the disclosure shall immediately (a) inform the Producing Party of all pertinent facts related to such disclosure, including without limitation, the name, address, and telephone number of the recipient and his or her employer; (b) use his or her best efforts to retrieve the disclosed information and all copies thereof; (c) advise the recipient of the improperly disclosed information, in writing, of the terms of this Order; (d) make his or her best efforts to require the recipient to execute an agreement to be bound by the terms of this Order in the form of the Acknowledgement attached as Exhibit A; and (e) take all other reasonable steps to prevent further disclosure by or to the unauthorized person who received the protected information.

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11. Return of Confidential Materials Upon Final Resolution: Upon written request of the Producing Party, within sixty (60) days after the entry of a final judgment no longer subject to appeal or the execution of any final agreement between the parties to resolve and settle this case, any party who has received Protected Materials, their counsel, and any person authorized by this Order to receive protected Materials shall, within thirty (30) days from the receipt of the written request, return to the Producing Party, or destroy, all information and documents subject to this Order, and any copies thereof, and any other writing containing, summarizing and/or disclosing the contents of any Protected Materials.

A. Returned materials shall be delivered in sealed envelopes marked "CONFIDENTIAL" to the Producing Parties' respective counsel;

B. Counsel of record shall be entitled to retain a copy of such materials in order to preserve its litigation file in this case;

C. An attorney from the outside law firm of record for each Party who received any Protected Materials in the course of this proceedings shall, upon request, provide a declaration under penalty of perjury certifying that, to the best of his or her knowledge, all Protected Materials (except outside counsel's litigation file) in their possession, custody or control have been destroyed or returned to outside counsel of record for the Producing Party.

12. Disposition of Evidence: At the conclusion of this case, the disposition of all Protected Materials entered into evidence shall be governed by the California Rules of Court or applicable Local Rules and may be withdrawn from evidence and the Court files by the Producing Party as permitted, unless otherwise ordered by the Court.

13. Nothing in this Order shall bar or otherwise restrict any attorney signing herein from rendering advice to his or her client with respect to this litigation and in the course thereof, referring to or relying upon his or her examination of Protected Materials; provided, however, that in rendering such advice the attorney shall not disclose the content or source of information to those persons not authorized to receive it.

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1 14. Amendment: This Order may be amended by the written agreement of counsel for
2 the parties to this agreement in the form of a stipulation that shall be filed in this case; provided
3 such amendment does not impose additional burdens on the Court and is approved by the Court.

4 15. Jurisdiction: The terms of this Order shall survive the conclusion of this action
5 and this Court shall retain jurisdiction of this action, the parties, their attorneys, and all other
6 persons to whom confidential information has been disclosed after its conclusion for the purposes
7 of enforcing the terms of this Order or redressing any violation thereof.

8 16. Access and Public Challenge: The Clerk is authorized to show a copy of this
9 Order to anyone desiring access to any of the papers of this suit and is ordered to deny access to
10 all papers filed pursuant to paragraph 5 of this Order. Any party or any interested member of the
11 public may seek leave of the Court to challenge the designation of particular documents filed
12 under seal as Protected Materials. If an interested member of the public makes such a challenge,
13 the Party who designated the material as Protected Materials shall be given the opportunity to
14 oppose any such challenge.

15 17. Good Faith: Each party agrees that designations of Protected Materials as
16 "CONFIDENTIAL" or "CONFIDENTIAL—ATTORNEYS' EYES ONLY" information and any
17 request and responses to permit further disclosure of any such designated information shall be
18 made in good faith and not to (a) impose burden or delay on any party, or (b) to use for tactical
19 purpose or other advantages in litigation.

20 18. Right to Further Relief: Any party knowing or believing that any other party is in
21 violation of or intends to violate this Order and has raised the question of violation or potential
22 violation with the opposing party and has been unable to resolve the matter by agreement, may
23 move the Court for an injunction or an Order to Show Cause seeking to hold that party in
24 contempt of Court and seeking such other relief, including sanctions, as may be appropriate under
25 the circumstances. Pending disposition of the motion by the Court, the party alleged to be in
26 violation of or intending to violate this Order shall discontinue the performance of and/or shall
27 not undertake the further performance of any action alleged to constitute a violation of this Order.

28 /////

19. Any party signing through counsel, and any party's counsel signing this Order or anyone signing the Acknowledgement attached as Exhibit A after the date that this Order is entered by this Court, will be bound by the terms of this Order.

IT IS SO STIPULATED.

Dated: March 14, 2008

DLA PIPER US LLP

By: 

JULIE L. HUSSEY
Attorneys for Defendant
TIME WARNER ENTERTAINMENT-
ADVANCE/ NEWHOUSE PARTNERSHIP, A
NEW YORK GENERAL PARTNERSHIP,
THROUGH ITS SAN DIEGO DIVISION,
DBA TIME WARNER CABLE

Dated: March 14, 2008

By: 

BARRON E. RAMOS
Attorneys for Plaintiff LEON ALPERT

Dated: March 14, 2008

CLARK AND MARKHAM

By: 

DAVID R. MARKHAM
Attorneys for Plaintiff LEON ALPERT

IT IS SO ORDERED.

Dated: MAR 21 2008, ~~2008~~

Luis R. Vargas, Judge

HONORABLE LUIS R. VARGAS.
JUDGE OF THE SUPERIOR COURT

1 **ACKNOWLEDGEMENT AND AGREEMENT PURSUANT**
2 **TO STIPULATED PROTECTIVE ORDER**
3

4 I, the undersigned, being duly sworn, agree and acknowledge:

5 (A) That I have read and understand the provisions of the STIPULATED
6 PROTECTIVE ORDER entered by the San Diego Superior Court in the action titled *Leon Alpert*
7 *v. Time Warner Cable, Inc.*, Case No. GIC88162 and agree to be bound thereby;

8 (B) For the purpose of enforcing the aforesaid STIPULATED PROTECTIVE ORDER
9 I hereby submit myself to the personal jurisdiction of the Court captioned above;

10 (C) I understand that documents and discovery materials produced in this action and
11 designated as Protected Materials may not be disclosed to anyone except as authorized in the
12 STIPULATED PROTECTIVE ORDER and may not be used for any purpose other than this
13 litigation. I will not disclose, discuss, write, or otherwise convey the Protected Materials which
14 are the subject of the STIPULATED PROTECTIVE ORDER or the contents of or information in
15 such Protected Materials, to anyone other than those authorized in the STIPULATED
16 PROTECTIVE ORDER.

17 (D) I shall, at the conclusion of this action, deliver to counsel for the party who has
18 provided such Protected Materials to me, for transmission to counsel for the Producing Party, all
19 documents that constitute Protected Materials which are the subject of the STIPULATED
20 PROTECTIVE ORDER and any and all notes, compilations, photographs, memos, etc., which
21 refer to the documents which are the subject of the STIPULATED PROTECTIVE ORDER, or
22 contents of or information in said documents.

23 (E) I understand that a violation of this Acknowledgement and Agreement is a
24 violation of the STIPULATED PROTECTIVE ORDER and may be punishable by sanctions
25 imposed by the Court, including but not limited to, citation for contempt.

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1 I declare under penalty of perjury that the foregoing is true and correct and that this
2 Acknowledgement and Agreement is executed this ____ day of _____, at
3 _____
4

5 By: _____
6 Address: _____
7 _____
8 Phone: _____
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EXHIBIT B

1 JEFFREY M. SHOHE (Bar No. 067529)
JULIE L. HUSSEY (Bar No. 237711)
2 CARRIE S. DOLTON (Bar No. 234298)
RYAN T. HANSEN (Bar No. 234329)
3 **DLA PIPER US LLP**
401 B Street, Suite 1700
4 San Diego, CA 92101-4297
Tel: 619.699.2700
5 Fax: 619.699.2701

FILED
SAN DIEGO SUPERIOR COURT

MAY 21 2008

CLERK OF THE SUPERIOR COURT
BY C. CHEELY

6 Attorneys for Defendant
7 TIME WARNER ENTERTAINMENT-ADVANCE/
NEWHOUSE PARTNERSHIP, A NEW YORK
8 GENERAL PARTNERSHIP, THROUGH ITS SAN
DIEGO DIVISION, DBA TIME WARNER CABLE
9

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SAN DIEGO
12

13 LEON ALPERT, an individual, on behalf
of himself, on behalf of all those similarly
14 situated, and on behalf of the general
public,

15 Plaintiffs,

16 v.

17 TIME WARNER CABLE, INC., a
18 Delaware corporation, and DOES 1 TO
100,

19 Defendants.
20
21

CASE NO. GIC881621

**DEFENDANT TIME WARNER CABLE'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL
FURTHER RESPONSES TO
INTERROGATORIES**

Date: April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

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California Bus. & Prof. Code § 17204	5
California Civil Procedure Code § 2023.030(a)	10
California Civil Procedure Code § 2031.310(d)	9
California Civil Procedure Code § 2031.320(b)	9
California Rules of Court Rule 3.1020(c)	7, 8
Robert I. Weil <i>et al.</i> , <i>California Practice Guide: Civil Procedure Before Trial</i> ¶ 8:1182, at 8F-72 (The Rutter Group, 2007)	9

Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a New York general partnership, through its San Diego Division, dba Time Warner Cable ("TWC"), sued erroneously as Time Warner Cable, Inc.,¹ submits the following Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Compel Further Responses to Interrogatories.

I. INTRODUCTION.

Plaintiff's motion to compel should be denied for several independent reasons. First, Plaintiff's motion is premature because it seeks statewide discovery, which is the very subject of TWC's pending motion for a protective order. In fact, TWC has repeatedly proposed to Plaintiff that in the interest of judicial economy and to avoid undue expense the parties should now focus on the merits of Plaintiff's claim and address class discovery and other class issues following a ruling on TWC's Motion for Summary Judgment. Although TWC's motion for Summary Judgment is scheduled for hearing on April 4, 2008, and despite TWC's agreement to postpone challenging class certification until after the Motion for Summary Judgment is heard, Plaintiff nonetheless has brought this motion to compel class discovery—which will be heard at the same time as TWC's Motion for Summary Judgment.

Second, Plaintiff's motion to compel class discovery issues is improper because Plaintiff lacks standing to assert his unfair competition claim on behalf of himself or a class. Plaintiff has suffered no injury or damage as a result of any alleged conduct by TWC and, therefore, has no standing to bring an unfair competition claim. In such cases, individuals like Plaintiff who lack standing are not permitted to conduct class discovery.

Lastly, Plaintiff's motion to compel must also be denied, regardless of how the Court rules on TWC's Motion for Summary Judgment, because it fails as a matter of law. Specifically,

¹ Plaintiff makes a reference in his moving papers that "Time Warner Cable, Inc., a Delaware Corporation" is the defendant in this case and should have answered the discovery requests instead of TWC. As pointed out by TWC at the commencement of this litigation, Plaintiff's naming of Time Warner Cable, Inc. was in error, as Time Warner Cable, Inc. is not the entity that owns and operates the cable business in San Diego. Rather than demur to Plaintiff's pleadings due to his error in identifying the correct corporate entity, TWC answered Plaintiff's amended complaint with the explanation that it had been "erroneously sued as Time Warner Cable, Inc." Plaintiff made no objection, nor has Plaintiff at anytime in this litigation objected to TWC's involvement in this litigation as the defendant erroneously sued as "Time Warner Cable, Inc." If Plaintiff wishes to proceed against Time Warner Cable, Inc. and not TWC, TWC requests a dismissal with prejudice from this lawsuit. Furthermore, Plaintiff's motion should be denied, as Time Warner Cable, Inc. has not been served with Plaintiff's operative complaint, nor has it entered an appearance in this case.

1 Plaintiff's moving papers fail to comply with court rules and make no mention of TWC's multiple
 2 objections to each disputed interrogatory. Plaintiff does not even fully address the one objection
 3 by TWC which he challenges, TWC's limitation of its responses to the San Diego/Desert Cities
 4 areas. As explained below, TWC was justified in limiting its responses in this manner.
 5 Moreover, Plaintiff does not challenge TWC's multiple other objections, which alone requires
 6 Plaintiff's motion be denied.

7 For all of these reasons, TWC respectfully requests the Court deny Plaintiff's motion to
 8 compel and request for sanctions.

9 **II. FACTUAL BACKGROUND.**

10 **A. Summary of Plaintiff's Complaint Against TWC.**

11 TWC provides cable services generally to members of the public. TWC also enters into
 12 bulk contracts with entities, such as apartments and homeowners' associations ("HOA"), to
 13 provide cable services to all of the homes within the complex at negotiated "bulk" rates. Plaintiff
 14 is a resident of a Bulk-customer HOA in the San Diego area which is part of the San
 15 Diego/Desert Cities division of Time Warner. Under the bulk contract between TWC and
 16 Plaintiff's HOA, TWC provides the basic tier of cable television channels to all residences in the
 17 HOA, including Plaintiff's residence, and the HOA pays TWC for such services. In addition,
 18 Plaintiff entered into his own agreement with TWC to order movie channels, internet service and
 19 other "Additional Services." TWC bills Plaintiff directly for the Additional Services that he
 20 ordered, and Plaintiff pays TWC for such services.

21 On or about May 16, 2007, Plaintiff filed the operative amended Complaint as a class
 22 action against TWC, alleging a single cause of action under California's Unfair Competition Law
 23 ("UCL"). Plaintiff alleges that TWC overcharged him by charging him for basic cable services
 24 provided under the bulk contract with his HOA. A class has not yet been certified and there are
 25 currently no scheduling deadlines in this matter.

26 ////

27 ////

28 ////

B. TWC Files a Motion for Summary Judgment, Agreeing to Address Class Issues, if Necessary, After the Motion.

On or about January 15, 2008, before challenging class certification, TWC filed a Motion for Summary Judgment on the ground that Plaintiff cannot prove his cause of action for violation of the UCL. If granted, TWC's Motion for Summary Judgment will dispose of every issue in this litigation. In an effort to resolve this meritless class action lawsuit and avoid significant expense and burden of litigation, TWC has chosen to file its summary judgment motion prior to challenging class certification. At this point in the litigation, only the issues related to Plaintiff individually and TWC's San Diego/Desert Cities Division are at issue. Indeed, at the initial Case Management Conference, TWC alerted counsel and the Court to its plan to file an early motion for summary judgment and its desire to defer the expense associated with class proceedings until its dispositive motion could be heard. TWC's summary judgment motion is scheduled to be heard at the same time as this motion to compel. Accordingly, discovery relating to putative class members and class allegations is unnecessary, unduly burdensome and expensive.

C. Plaintiff Propounds and Seeks to Enforce Class Discovery.

Even though TWC has moved for summary judgment on the merits of Plaintiff's claim before contesting class certification, and even though Plaintiff knows that TWC has agreed to postpone addressing class certification issues until after TWC's Motion for Summary Judgment, Plaintiff has nonetheless propounded and moved to compel responses to interrogatories relating to class certification—an issue that likely will be rendered moot following the Court's order on TWC's Motion for Summary Judgment that will be heard at the same time as this motion.

III. PLAINTIFF'S MOTION TO COMPEL IS PREMATURE.

A. The Class Discovery Sought by Plaintiff May be Unnecessary After the Court Rules on TWC's Pending Motion for Summary Judgment.

Plaintiff has moved to compel further responses to one form interrogatory and all of the special interrogatories propounded on TWC. (Motion to Compel, p. 7-11.) The only basis for his motion is that "the responses attempt to self-limit the responses [to the interrogatories] to only the San Diego and Desert Cities areas, whereas the scope of the interrogatories clearly deal with

1 TWC's statewide activities." (Motion to Compel, p. 3. ll. 10-13.) As discussed in more detail
 2 below, the potential scope of the interrogatories extends far beyond TWC's statewide activities.
 3 But even if the interrogatories did seek information limited to divisions of TWC in California,
 4 Plaintiff's motion should nevertheless be denied because it is premature given that the pending
 5 motion for summary judgment may moot any and all class certification issues.²

6 **B. Responding to Plaintiff's Class Discovery Would Cause Undue Burden and**
 7 **Expense.**

8 As explained on multiple occasions to Plaintiff's counsel, Mr. Barron Ramos, responding
 9 to Plaintiff's class discovery at this time would result in undue burden and expense to TWC, in
 10 light of the decentralized structure of Time Warner (Declaration of Julie Hussey³ ("Hussey
 11 Decl.") ¶¶ 2-4). Time Warner Cable is a decentralized company. (Declaration of Terri Rhodes⁴
 12 ("Rhodes Decl.") ¶ 2.) There are many divisions of Time Warner Cable across the United States,
 13 and each separate division acts as a separate and distinct entity. (Rhodes Decl. ¶ 2.) The separate
 14 divisions have separate marketing, finance, customer service, and human resources departments.
 15 (Rhodes Decl. ¶ 3.) They have separate budgets with their own expenses and revenues. (Rhodes
 16 Decl. ¶ 4.) They have separate pricing policies and procedures. (Rhodes Decl. ¶ 5.) They have
 17 separate marketing policies and procedures. (Rhodes Decl. ¶ 6.) They have separate
 18 components, products and packages of services from the other divisions. (Rhodes Decl. ¶ 7.)
 19 The separate divisions even train their customer service representative separately. (Rhodes Decl.
 20 ¶ 8.)

21 Plaintiff has two accounts with TWC in the San Diego/Desert Cities division. (Rhodes
 22 Decl. ¶ 9; Hussey Decl. ¶ 5, Ex. C.) That division provides cable services only in the San Diego
 23

24 ² Although Plaintiff's moving papers allege that further responses to the interrogatories are "necessary for plaintiff to
 25 defend against TWC's pending Motion for Summary Judgment," it is unclear how the sought-after class discovery
 would have *any* bearing on the merits of Plaintiff's allegations, which is the subject of TWC's motion for summary
 judgment. (Motion to Compel, p. 2, ll. 7-8.)

26 ³ "Declaration of Julie Hussey" and "Hussey Decl." refer to the Declaration of Julie Hussey in Support of Defendant
 27 Time Warner Cable's Opposition to Plaintiff's Motion to Compel Further Responses to Interrogatories.

28 ⁴ "Declaration of Terri Rhodes" and "Rhodes Decl." refer to the Declaration of Terri Rhodes in Support of Defendant
 Time Warner Cable's Opposition to Plaintiff's Motion to Compel Further Responses to Interrogatories.

1 and Desert Cities areas in California and does not provide cable services to other California
 2 locations. (Rhodes Decl. ¶¶ 10-11.) Accordingly, any attempt by Plaintiffs to conduct discovery
 3 related to other than TWC's San Diego/Desert Cities Division is irrelevant to the issues of
 4 liability to Alpert underlying the pending motion for summary judgment. Thus, because: (1) class
 5 discovery is irrelevant to the pending motion for summary judgment; (2) the court's ruling on the
 6 motion for summary judgment will likely moot all class issues; and (3) class discovery would
 7 require premature and undue burden and expense from TWC, Plaintiff's motion to compel should
 8 be denied.

9 **IV. PLAINTIFF IS NOT ENTITLED TO CLASS DISCOVERY BECAUSE HE LACKS**
 10 **STANDING TO BRING A UCL CLAIM.**

11 Additionally, Plaintiff's motion should be denied because Plaintiff does not have standing
 12 to bring this action, and thus he is not entitled to class discovery. *See First American Title*
 13 *Insurance Co. v. Superior Court*, 146 Cal. App. 4th 1564, 1573 (2007). After the passage of
 14 Proposition 64 in 2004, an individual has standing to pursue remedies under the UCL only if he
 15 personally "suffered injury in fact and has lost money or property as a result of such unfair
 16 competition." Cal. Bus. & Prof. Code § 17204; *Consumer Advocacy Group, Inc. v. Kintetsu*
 17 *Enterprises of America*, 150 Cal. App. 4th 953, 802 (2007). Further, to pursue a representative
 18 action under the UCL, the Plaintiff must "meet the standing requirements of Section 17204." *Id.*
 19 § 17203. Thus, Plaintiff has standing to bring this action *only* if he suffered injury in fact from
 20 the allegedly unlawful practice.

21 A plaintiff who lacks standing to bring a representative action under the UCL may not
 22 obtain class discovery. *First American Title Insur. Co. v. Superior Court*, 146 Cal. App. 4th
 23 1564, 1573 (2007).⁵ In *First American Title*, the court held that it is an abuse of discretion for a
 24 court to allow a plaintiff who purports to bring a cause of action on behalf of a class of which he
 25 was never a member to obtain pre-certification discovery to find a new class representative. *Id.*

26 ⁵ In *First American Title*, the court acknowledged that "when a class representative lacks standing to represent the
 27 class, the representative may be granted leave to amend to redefine the class or add new individual plaintiffs, or
 28 both." *First American Title*, 146 Cal. App. 4th at 1574. However, "[t]his rule is usually applied in situations where
 the class representative *originally* had standing, but has since lost it by intervening law or facts." *Id.* Here, Plaintiff
 never had standing to bring this action.

1 The court explained that “California law is clear that a representative plaintiff must be a member
 2 of the class he seeks to represent. Indeed, Proposition 64 was enacted to prevent abuses of the
 3 class action system by ‘prohibiting private attorneys from filing lawsuits for unfair competition
 4 where they have no client who has been injured in fact.’” *Id.* at 743 (citing *Californians for*
 5 *Disabilities Rights v. Mervyn’s, LLC*, 39 Cal. 4th 223, 228 (2006)). Further, the court stated that
 6 it “cannot permit attorneys to make an ‘end-run’ around Proposition 64 by filing class actions in
 7 the name of private individuals who are not members of the classes they seek to represent and
 8 then using pre-certification discovery to obtain more appropriate plaintiffs.” *Id.*

9 Here, Plaintiff has never had standing to bring this representative action under the UCL.
 10 As explained in TWC’s Motion for Summary Judgment, Plaintiff has not suffered any injury from
 11 purchasing his cable services from TWC. (See Memorandum of Points and Authorities in
 12 Support of Defendant Time Warner Cable’s Motion for Summary Judgment (“Motion for
 13 Summary Judgment brief”), p. 20-21.) Plaintiff received exactly what he paid for when
 14 purchasing Additional Services from TWC, and thus did not lose any money or property as a
 15 result of TWC’s practices. See *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 339 (1998) (section
 16 17200 claim dismissed because purchasers of calling cards, even if misled into purchasing the
 17 cards by defendant’s representations, “received exactly what they paid for” when using the cards
 18 after their purchase). Plaintiff admitted that he purchased and paid for Additional Services, that
 19 TWC’s billing for the Additional Services he ordered were correct, and that he received the
 20 Additional Services that he ordered. (Hussey Decl. ¶ 5, Ex. C) Therefore, Plaintiff received
 21 exactly what he paid for and has no measurable loss to support a UCL claim. Accordingly,
 22 Plaintiff lacks standing and should not be permitted to conduct class discovery.

23 Plaintiff’s citation to *Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 929 (1985) as
 24 authority for his contention that “in proving an unfair business practice violation, claimants are
 25 entitled to introduce evidence not only of practices which affect them individually, but also
 26 similar practices involving other members of the public who are not parties to the action,” is
 27 misplaced and does not support his position. *Perdue* makes no mention of discovery or
 28 evidentiary issues. And there is certainly nothing in that case that supports the notion that a

1 Plaintiff to an UCL action may introduce evidence that has no bearing on the merits of his case,
 2 especially in light of the standing requirements created by the passage of Proposition 64.

3 **V. PLAINTIFF'S MOTION TO COMPEL IS DEFECTIVE AND INCOMPLETE.**

4 Additionally, Plaintiff's motion to compel must be denied because it is defective and fails
 5 to address the multiple objections TWC raised in response to the disputed interrogatories.
 6 Plaintiff's separate statement is a confusing mixture of interrogatories and partial responses that
 7 fails to comply with the rules for a motion to compel, fails to address all of the objections and
 8 issues regarding each of the interrogatories at issue, and fails to provide proper support for
 9 Plaintiff's motion.

10 **A. Plaintiff's Separate Statement does not Comply with CRC Rule 3.1020(c).**

11 Under California Rules of Court Rule 3.1020(c) ("Rule 3.1020(c)"), a motion to compel
 12 further responses to interrogatories *must* be accompanied by a separate statement that is "full and
 13 complete so that no person is required to review any other document in order to determine the full
 14 request and the full response." It must also set forth "the text of each response, answer, or
 15 objection" and a "statement of the factual and legal reasons for compelling further responses,
 16 answers, or production *as to each matter in dispute.*" Rule 3.1020(c)(2)-(3)(emphasis added).

17 Plaintiff's unique separate statement does not comply with the statute. Rather than setting
 18 forth verbatim each response and every objection made by TWC to Plaintiff's interrogatories, the
 19 separate statement paraphrases TWC's responses and fails to address *any* of TWC's specific
 20 objections to each interrogatory. The sole objection Plaintiff challenges—TWC's general
 21 objection limiting its responses to "TWC-SAN DIEGO/DESERT CITIES," is not even set forth
 22 in Plaintiff's Separate Statement. Plaintiff included merely an excerpt of TWC's responses
 23 and/or objections that indicates "TWC-SAN DIEGO/DESERT CITIES objects to this
 24 interrogatory" and/or "TWC-SAN DIEGO/DESERT CITIES responds as follows," not
 25 addressing the objection behind such excerpts:

26 TWC-SAN DIEGO/DESERT CITIES objects to Plaintiff's purported definition
 27 of the terms "YOU," and "YOUR" on the ground that it renders each
 28 interrogatory including these terms to be vague and ambiguous, as well as overly
 broad. The definition is so overbroad that it appears to call for information from

literally hundreds of different corporate entities and their privileged communications with their counsel. TWC—SAN DIEGO/DESERT CITIES shall construe the terms “YOU,” and “YOUR,” when used in the interrogatories, to mean Time Warner Entertainment-Advance/Newhouse Partnership, a New York general partnership, through its San Diego Division (“TWC—SAN DIEGO/DESERT CITIES”), which operates in the San Diego and Desert Cities areas, dba Time Warner Cable and no other person or entity.

(See TWC Separate Statement p. 4-5.)⁶ Presumably, Plaintiff’s failed to address the entirety of the above objection because it is valid. Had TWC not restricted its responses to “TWC-SAN DIEGO/DESERT CITIES” and answered the interrogatories as requested, it may have been forced to provide clearly irrelevant and burdensome information about *all* TWC entities throughout the state and perhaps even the nation—or simply object to all the interrogatories and provide no answers at all. However, in an attempt to provide Plaintiff with as much relevant and responsive information as possible, TWC answered only on behalf of the TWC Division with whom Plaintiff had accounts.

B. Plaintiff Does Not Challenge TWC’s Specific Objections.

Additionally, in responding to each interrogatory at issue, TWC made multiple objections that were tailored to each specific interrogatory. Plaintiff’s separate statement does not set forth *any* of the general or specific objections to each interrogatory in dispute, let alone address why such objections should not apply. Plaintiff merely claims that “each of the responses incorporates the following prefatory language which is used to improperly limit the response to only the San Diego and Desert Cities areas.” (Motion to Compel, p. 11, ll. 12-13.)⁷ This is simply not sufficient.

Plaintiff cannot seek to compel further responses by cherry-picking only certain responses made by TWC and ignoring its other responses and objections to the same interrogatories. *See* Cal. Rule of Court Rule 3.1020(c)(2)-(3). California law requires that the separate statement

⁶ “TWC Separate Statement” refers to Defendant Time Warner Cable’s Separate Statement in Opposition to Plaintiff’s Motion to Compel Further Responses to Plaintiff’s Interrogatories.

⁷ Plaintiff also contends that TWC conceded the propriety of each interrogatory by answering all of the questions but limiting its answers to only San Diego and the Desert Cities. (Motion to Compel, p. 11, ll. 26-27.) Such assertion is mistaken, since TWC made specific objections to each and every interrogatory in dispute.

1 address each of the objections for the interrogatories in dispute. *Id.* Plaintiff has not done this,
2 and thus his motion to compel should be denied.

3 **C. The Court Must Rule on Each Objection Separately.**

4 In ruling on a motion to compel, the court must rule on each objection separately. *See*
5 Robert I. Weil et al., *California Practice Guide: Civil Procedure Before Trial* ¶ 8:1182, at 8F-72
6 (The Rutter Group, 2007). It is an abuse of discretion to fully grant a motion to compel if *any* of
7 the objections to a discovery request are valid. *Deaile v. General Telephone Co. of Calif.*, 40 Cal.
8 App. 3d 841, 851 (1974). A court may deny “in toto” the motion to compel further answers
9 where the questions are objectionable in their entirety. *Id.*

10 Neither Plaintiff’s motion to compel nor his separate statement set forth or address *any* of
11 TWC’s individual objections to each interrogatory. In fact, it appears that Plaintiff only takes
12 issue with one of TWC’s general objections pertaining to Plaintiff’s overly broad definition of
13 “YOU” and “YOUR.” However, even in attacking that one general objection, Plaintiff does not
14 provide the full text of TWC’s objection. Rather, he merely sets forth the restrictive language in
15 the responses that reflect TWC’s objection. Thus, because Plaintiff has not challenged the
16 sufficiency of each of TWC’s objections, and because the motion to compel must be denied if
17 even *one* of the objections is valid, it would be improper for the court to grant Plaintiff’s motion
18 as presented.

19 **VI. PLAINTIFF’S REQUEST FOR SANCTIONS IS ENTIRELY UNWARRANTED.**

20 The Discovery Act provides that monetary sanctions shall be imposed against the losing
21 party and/or attorney on a motion to compel, except where the Court finds the losing party acted
22 with substantial justification. Cal. Civ. Proc. Code §§ 2031.310(d), 2031.320(b). Sanctions
23 against TWC are not proper here because, as explained above, discovery unrelated to TWC’s San
24 Diego/Desert Cities Division is currently irrelevant and unnecessary because the resolution of
25 TWC’s Motion for Summary Judgment may eliminate the need for any such discovery. If
26 TWC’s Motion for Summary Judgment is granted the recent, burdensome, and costly discovery
27 onslaught will have been a complete waste of resources for all concerned. At a minimum,
28 principles of judicial economy require that the Motion for Summary Judgment be resolved before

1 discovery related to class certification be undertaken. Furthermore, Plaintiff has not made any
 2 attempt to address or refute TWC's many objections to the discovery requests at issue. In light of
 3 these considerations, sanctions are not warranted. Cal. Civ. Proc. Code § 2023.030(a).⁸

4 **VII. CONCLUSION.**

5 For all the foregoing reasons, TWC requests that the Court deny Plaintiff's motion to
 6 compel and request for sanctions.

7 Dated: March 21, 2008

DLA PIPER US LLP

By 

JEFFREY M. SHOHE
 JULIE L. HUSSEY
 CARRIE S. DOLTON
 RYAN T. HANSEN
 Attorneys for Defendant
 TIME WARNER ENTERTAINMENT-
 ADVANCE/NEWHOUSE PARTNERSHIP, A
 NEW YORK GENERAL PARTNERSHIP,
 THROUGH ITS SAN DIEGO DIVISION,
 DBA TIME WARNER CABLE

8 Moreover, TWC disputes the amount of sanctions requested by Plaintiff, as a large portion of his moving papers appear to have been copied and pasted nearly verbatim from his other motions to compel. Additionally, TWC does not believe the briefing reflects eight hours of work.

1 JEFFREY M. SHOHET (Bar No. 067529)
2 JULIE L. HUSSEY (Bar No. 237711)
3 CARRIE S. DOLTON (Bar No. 234298)
4 RYAN T. HANSEN (Bar No. 234329)
5 **DLA PIPER US LLP**
6 401 B Street, Suite 1700
7 San Diego, CA 92101-4297
8 Tel: 619.699.2700
9 Fax: 619.699.2701

10 Attorneys for Defendant
11 TIME WARNER ENTERTAINMENT-ADVANCE/
12 NEWHOUSE PARTNERSHIP, A NEW YORK
13 GENERAL PARTNERSHIP, THROUGH ITS SAN
14 DIEGO DIVISION, DBA TIME WARNER CABLE

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

LEON ALPERT, an individual, on behalf
of himself, on behalf of all those similarly
situated, and on behalf of the general
public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a
Delaware corporation, and DOES 1 TO
100,

Defendants.

CASE NO. GIC881621

**DEFENDANT TIME WARNER CABLE'S
SEPARATE STATEMENT IN
OPPOSITION TO PLAINTIFF'S MOTION
TO COMPEL FURTHER RESPONSES TO
PLAINTIFF'S INTERROGATORIES**

Date April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Hon. Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a New York general partnership, through its San Diego Division, dba Time Warner Cable ("TWC"), sued erroneously as Time Warner Cable, Inc., respectfully submits the following Separate Statement in Opposition to Plaintiff's Motion to Compel Further Responses to Plaintiff's Interrogatories.

(i) THE SPECIAL INTERROGATORIES

1. During the CLASS PERIOD (The term "CLASS PERIOD" shall refer to the time period beginning March 13, 2003 and ending March 13, 2007), for how many RESIDENTS (The term "RESIDENT" shall refer to occupants of properties during the CLASS PERIOD that were part of a homeowners' association (HOA) in California with whom YOU had entered into a "Residential Bulk Services Agreement" to provide basic cable services to the HOA members) did YOU (The term "YOU" or "YOUR" shall refer to defendant Time Warner Cable, Inc., its parent company, if any, and all subsidiaries of such parent, the employees, agents, officers, directors and representatives of all of these entities, and all other persons or entities acting on behalf or under the control of these entities) provide service in the State of California?

2. During the entire CLASS PERIOD, did YOU provide RESIDENTS pricing for services that reflected the fact that RESIDENTS were already paying for basic and/or expanded cable services through their HOA (hereinafter "RESIDENT Pricing")?

3. If during the entire CLASS PERIOD YOU did not provide RESIDENT Pricing for services that reflected the fact that RESIDENTS were already paying for basic and/or expanded cable services through their HOA, why not?

4. If YOU provided RESIDENT Pricing for services that reflected the fact that RESIDENTS were already paying for basic and/or expanded cable services through their HOA for a portion of the CLASS PERIOD, please identify the dates that YOU provided such pricing.

5. During the CLASS PERIOD, if YOU published RESIDENT Pricing on the Internet just as you published retail pricing, please identify the specific URLs where such pricing appeared.

6. If during the CLASS PERIOD YOU did not publish RESIDENT Pricing on the Internet just as you published retail pricing, why not?

1 7. During the CLASS PERIOD, did YOU make RESIDENT Pricing known to
2 RESIDENTS?

3 8. If during the CLASS PERIOD YOU made RESIDENT Pricing known to
4 RESIDENTS, how did YOU do so?

5 9. Do YOU contend that YOU only bundle services for RESIDENTS when a
6 RESIDENT requests a specific bundle?

7 10. If YOU contend that YOU only bundle services for RESIDENTS when a
8 RESIDENT requests a specific bundle, please state all facts that support that contention.

9 11. If YOU contend that YOU only bundle services for RESIDENTS when a
10 RESIDENT requests a specific bundle, please identify all witnesses that support that contention.

11 12. If YOU contend that YOU only bundle services for RESIDENTS when a
12 RESIDENT requests a specific bundle, please identify all documents that support that contention.

13 13. Please identify the customer service representative whose recorded conversation
14 with plaintiff Alpert (which Time Warner has misplaced/destroyed) resulted in Alpert being
15 placed in an HOA bundle in the fall of 2006.

16 14. Did plaintiff Alpert have bundled services before he had the conversation with
17 YOUR customer service representative that resulted in Alpert being placed in an HOA bundle in
18 the fall of 2006?

19 15. If Plaintiff Alpert had bundled services before he had the conversation with YOUR
20 customer service representative that resulted in Alpert being placed in an HOA bundle in the fall
21 of 2006, please identify each and every bundle he already had in place at the time that
22 conversation occurred.

23 16. If plaintiff Alpert had bundled services before he had the conversation with YOUR
24 customer service representative that resulted in Alpert being placed in an HOA bundle in the fall
25 of 2006, for each bundle Alpert had at that time, please state whether Alpert had specifically
26 requested that particular bundle or whether YOU had bundled Alpert.

27 ////

28 ////

1 17. Do YOU contend that plaintiff Alpert had an HOA bundle of any kind before he
2 had the conversation with YOUR customer service representative that resulted in Alpert being
3 placed in an HOA bundle in the fall of 2006?

4 18. If YOU contend that plaintiff Alpert had an HOA bundle of any kind before he had
5 the conversation with YOUR customer service representative that resulted in Alpert being placed
6 in an HOA bundle in the fall of 2006, please state all facts that support that contention.

7 19. If YOU contend that plaintiff Alpert had an HOA bundle of any kind before he had
8 the conversation with YOUR customer service representative that resulted in Alpert being placed
9 in an HOA bundle in the fall of 2006, please identify all documents that support that contention.

10 20. If YOU contend that plaintiff Alpert had an HOA bundle of any kind before he had
11 the conversation with YOUR customer service representative that resulted in Alpert being placed
12 in an HOA bundle in the fall of 2006, please identify all witnesses that support that contention.

13 21. Why did YOU destroy the audio recording of the conversation with YOUR
14 customer service representative that resulted in Alpert being placed in an HOA bundle in the fall
15 of 2006?

16 22. Do YOU contend that YOU notified plaintiff Alpert of HOA bundles before the
17 conversation with YOUR customer service representative that resulted in Alpert being placed in
18 an HOA bundle in the fall of 2006?

19 23. If YOU contend that YOU notified plaintiff Alpert of HOA bundles before the
20 conversation with YOUR customer service representative that resulted in Alpert being placed in
21 an HOA bundle in the fall of 2006, please state all facts that support that contention

22 24. If YOU contend that YOU notified plaintiff Alpert of HOA bundles before the
23 conversation with YOUR customer service representative that resulted in Alpert being placed in
24 an HOA bundle in the fall of 2006, please identify all documents which support that contention.

25 25. If YOU contend that YOU notified plaintiff Alpert of HOA bundles before the
26 conversation with YOUR customer service representative that resulted in Alpert being placed in
27 an HOA bundle in the fall of 2006, please identify all witnesses that support that contention.

28 /////

1 26. When did YOU begin offering HOA bundles in California?

2 27. When did YOU begin offering retail bundles in California?

3 28. With how many HOAs in the State of California did YOU have a contract to
4 provide services during the CLASS PERIOD?

5 29. Did YOU automatically bundle services when RESIDENTS called to request
6 additional services during the CLASS PERIOD?

7 30. Do YOU contend that the class in this case should not be certified?

8 31. If YOU contend that the class in this case should not be certified, please state all
9 facts upon which YOU base that contention.

10 32. If YOU contend that the class in this case should not be certified, please identify
11 all documents which support that contention.

12 33. If YOU contend that the class in this case should not be certified, please identify
13 all witnesses who support that contention.

14 **(ii) FORM INTERROGATORY NO. 15.1**

15 Identify each denial of a material allegation and each special and affirmative defense in
16 your pleadings and for each:

17 (a) state all facts upon which you base the denial or special or affirmative defense;

18 (b) state the names, ADDRESSES, and telephone numbers of all PERSONS who have
19 knowledge of those facts; and

20 (c) identify all DOCUMENTS and other tangible things that support your denial or
21 special or affirmative defenses, and state the name, ADDRESS, and telephone number of the
22 PERSON who has each DOCUMENT.

23 **(iii) TWC'S RESPONSE TO SPECIAL INTERROGATORY NOS. 1-33, AND TO FORM**
24 **INTERROGATORY NO. 15.1**

25 *Each of the responses incorporates the following prefatory language which is used to*
26 *improperly limit the response to only the San Diego and Desert Cities areas:*

27 "In addition to the General Objections set forth above, which are incorporated by
28 reference herein, TWC-SAN DIEGO/DESERT CITIES objects to this interrogatory..." This

1 identical statement appears in each response. Each interrogatory is then answered, but only as it
 2 relates to TWC's San Diego and Desert Cities unit with the following language:

3 "Subject to and without waiving the foregoing objections or the General Objections set
 4 forth above, TWC-SAN DIEGO/DESERT CITIES responds as follows:" This statement appears
 5 in each "answer."

6 **PLAINTIFF'S BASIS FOR COMPELLING FURTHER RESPONSES TO**
 7 **INTERROGATORIES**

8 It is well settled that objections to an entire set of interrogatories, such as TWC has raised
 9 here, are not sustainable if any of the questions are proper. *Wooldridge v. Mounts* (1962) 199
 10 Cal.App.2d 620, 628. By answering all of the questions, but limiting all of its answers to only
 11 San Diego and Desert Cities, TWC concedes the propriety of the questions – but simply refuses to
 12 answer the questions beyond the San Diego and Desert Cities areas. The FAC at paragraph 4
 13 makes plain that this is a statewide action, not a San Diego and Desert Cities action.

14 Moreover, the answering party is not, apparently, even the defendant in this case. The
 15 defendant is "Time Warner Cable, Inc., a Delaware Corporation," whereas the responses state
 16 they are from "TWC-SAN DIEGO/DESERT CITIES." That entity is not a party to this litigation
 17 and is not named in the FAC. Thus, all of the responses, including the critical factual bases for
 18 TWC's numerous affirmative defenses, are defective as they relate to an entity that is not the
 19 defendant in this case.

20 Code of Civil Procedure section 2017.010 provides that unless the court imposes limits,
 21 "any party may obtain discovery regarding any matter, not privileged, that is relevant to the
 22 subject matter involved in the pending action or to the determination of any motion made in that
 23 action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead
 24 to the discovery of admissible evidence." "The scope of discovery is very broad." *Tien v.*
 25 *Superior Court* (2006) 139 Cal.App.4th 528, 535.

26 The "expansive scope of discovery" (*Emerson Electric Co. v. Superior Court* (1997) 16
 27 Cal.4th 1101, 1108) is a deliberate attempt to "take the 'game' element out of trial preparation"
 28 and to "do away 'with the sporting theory of litigation – namely, surprise at the trial.'"

1 *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376. TWC takes the game element in
2 this case to a new level by hiding relevant documents and now refusing to answer interrogatories.

3 Finally, this is B&P section 17200 case. As our Supreme Court has made plain, in
4 proving an unfair business practice violation, claimants are entitled to introduce evidence not only
5 of practices which affect them individually, but also similar practices involving other members of
6 the public who are not parties to the action. *Perdue v. Crocker National Bank* (1985) 38 Cal.3d
7 913, 929.

8 TWC's attempt to limit discovery in this case is thus contrary to the "broad" scope of
9 discovery permitted under Code of Civil Procedure section 2017.010, is a deliberate attempt to
10 put the "game element" back into litigation, and is contrary to the expansive scope of discovery in
11 both class actions and B&P section 17200 claims in particular.

12 For all these reasons and those set forth herein, plaintiff's Motion should be granted.

13 **REASONS WHY NO FURTHER RESPONSE IS REQUIRED:**

14 Plaintiff's motion to compel should be denied for several independent reasons. First,
15 Plaintiff's motion is premature because it seeks statewide discovery, which is the very subject of
16 TWC's pending motion for a protective order. In fact, TWC has repeatedly proposed to Plaintiff
17 that in the interest of judicial economy and to avoid undue expense the parties should now focus
18 on the merits of Plaintiff's claim and address class discovery and other class issues following a
19 ruling on TWC's Motion for Summary Judgment. Although TWC's motion for Summary
20 Judgment is scheduled for hearing on April 4, 2008, and despite TWC's agreement to postpone
21 challenging class certification until after the Motion for Summary Judgment is heard, Plaintiff
22 nonetheless has brought this motion to compel class discovery—which will be heard at the same
23 time as TWC's Motion for Summary Judgment.

24 As explained on multiple occasions to Plaintiff's counsel, Mr. Barron Ramos, responding
25 to Plaintiff's class discovery at this time would result in undue burden and expense to TWC, in
26 light of the decentralized structure of Time Warner (Declaration of Julie Hussey¹ ("Hussey

27 ¹ "Declaration of Julie Hussey" and "Hussey Decl." refer to the Declaration of Julie Hussey in Support of Defendant
28 Time Warner Cable's Opposition to Plaintiff's Motion to Compel Further Responses to Interrogatories.

Decl.”) ¶¶ 2-4). Time Warner Cable is a decentralized company. (Declaration of Terri Rhodes² (“Rhodes Decl.”) ¶ 2.) There are many divisions of Time Warner Cable across the United States, and each separate division acts as a separate and distinct entity. (Rhodes Decl. ¶ 2.) The separate divisions have separate marketing, finance, customer service, and human resources departments. (Rhodes Decl. ¶ 3.) They have separate budgets with their own expenses and revenues. (Rhodes Decl. ¶ 4.) They have separate pricing policies and procedures. (Rhodes Decl. ¶ 5.) They have separate marketing policies and procedures. (Rhodes Decl. ¶ 6.) They have separate components, products and packages of services from the other divisions. (Rhodes Decl. ¶ 7.) The separate divisions even train their customer service representative separately. (Rhodes Decl. ¶ 8.)

Plaintiff has two accounts with TWC in the San Diego/Desert Cities division. (Rhodes Decl. ¶ 9; Hussey Decl. ¶ 5, Ex. C.) That division provides cable services only in the San Diego and Desert Cities areas in California and does not provide cable services to other California locations. (Rhodes Decl. ¶¶ 10-11.) Accordingly, any attempt by Plaintiffs to conduct discovery related to other than TWC’s San Diego/Desert Cities Division is irrelevant to the issues of liability to Alpert underlying the pending motion for summary judgment. Thus, because: (1) class discovery is irrelevant to the pending motion for summary judgment; (2) the court’s ruling on the motion for summary judgment will likely moot all class issues; and (3) class discovery would require premature and undue burden and expense from TWC, Plaintiff’s motion to compel should be denied.

Second, Plaintiff’s motion to compel class discovery issues is improper because Plaintiff lacks standing to assert his unfair competition claim on behalf of himself or a class. Plaintiff has suffered no injury or damage as a result of any alleged conduct by TWC and, therefore, has no standing to bring an unfair competition claim. In such cases, individuals like Plaintiff who lack standing are not permitted to conduct class discovery. *See First American Title Insurance Co. v. Superior Court*, 146 Cal. App. 4th 1564, 1573 (2007).

² “Declaration of Terri Rhodes” and “Rhodes Decl.” refer to the Declaration of Terri Rhodes in Support of Defendant Time Warner Cable’s Opposition to Plaintiff’s Motion to Compel Further Responses to Interrogatories.

1 After the passage of Proposition 64 in 2004, an individual has standing to pursue remedies
 2 under the UCL only if he personally “suffered injury in fact and has lost money or property as a
 3 result of such unfair competition.” Cal. Bus. & Prof. Code § 17204; *Consumer Advocacy Group,*
 4 *Inc. v. Kintetsu Enterprises of America*, 150 Cal. App. 4th 953, 802 (2007). Further, to pursue a
 5 representative action under the UCL, the Plaintiff must “meet the standing requirements of
 6 Section 17204.” *Id.* § 17203. Thus, Plaintiff has standing to bring this action *only* if he suffered
 7 injury in fact from the allegedly unlawful practice.

8 A plaintiff who lacks standing to bring a representative action under the UCL may not
 9 obtain class discovery. *First American Title Insur. Co. v. Superior Court*, 146 Cal. App. 4th
 10 1564, 1573 (2007).³ In *First American Title*, the court held that it is an abuse of discretion for a
 11 court to allow a plaintiff who purports to bring a cause of action on behalf of a class of which he
 12 was never a member to obtain pre-certification discovery to find a new class representative. *Id.*
 13 The court explained that “California law is clear that a representative plaintiff must be a member
 14 of the class he seeks to represent. Indeed, Proposition 64 was enacted to prevent abuses of the
 15 class action system by ‘prohibiting private attorneys from filing lawsuits for unfair competition
 16 where they have no client who has been injured in fact.’” *Id.* at 743 (citing *Californians for*
 17 *Disabilities Rights v. Mervyn’s, LLC*, 39 Cal. 4th 223, 228 (2006)). Further, the court stated that
 18 it “cannot permit attorneys to make an ‘end-run’ around Proposition 64 by filing class actions in
 19 the name of private individuals who are not members of the classes they seek to represent and
 20 then using pre-certification discovery to obtain more appropriate plaintiffs.” *Id.*

21 Here, Plaintiff has never had standing to bring this representative action under the UCL.
 22 As explained in TWC’s Motion for Summary Judgment, Plaintiff has not suffered any injury from
 23 purchasing his cable services from TWC. (See Memorandum of Points and Authorities in
 24 Support of Defendant Time Warner Cable’s Motion for Summary Judgment (“Motion for
 25 Summary Judgment brief”), p. 20-21.) Plaintiff received exactly what he paid for when

26 ³ In *First American Title*, the court acknowledged that “when a class representative lacks standing to represent the
 27 class, the representative may be granted leave to amend to redefine the class or add new individual plaintiffs, or
 28 both.” *First American Title*, 146 Cal. App. 4th at 1574. However, “[t]his rule is usually applied in situations where
 the class representative *originally* had standing, but has since lost it by intervening law or facts.” *Id.* Here, Plaintiff
 never had standing to bring this action.

1 purchasing Additional Services from TWC, and thus did not lose any money or property as a
 2 result of TWC's practices. *See Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 339 (1998) (section
 3 17200 claim dismissed because purchasers of calling cards, even if misled into purchasing the
 4 cards by defendant's representations, "received exactly what they paid for" when using the cards
 5 after their purchase). Plaintiff admitted that he purchased and paid for Additional Services, that
 6 TWC's billing for the Additional Services he ordered were correct, and that he received the
 7 Additional Services that he ordered. (Hussey Decl. ¶ 5, Ex. C) Therefore, Plaintiff received
 8 exactly what he paid for and has no measurable loss to support a UCL claim. Accordingly,
 9 Plaintiff lacks standing and should not be permitted to conduct class discovery.

10 Plaintiff's citation to *Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 929 (1985) as
 11 authority for his contention that "in proving an unfair business practice violation, claimants are
 12 entitled to introduce evidence not only of practices which affect them individually, but also
 13 similar practices involving other members of the public who are not parties to the action," is
 14 misplaced and does not support his position. *Perdue* makes no mention of discovery or
 15 evidentiary issues. And there is certainly nothing in that case that supports the notion that a
 16 Plaintiff to an UCL action may introduce evidence that has no bearing on the merits of his case,
 17 especially in light of the standing requirements created by the passage of Proposition 64.

18 Lastly, Plaintiff's motion to compel must also be denied, regardless of how the Court rules
 19 on TWC's Motion for Summary Judgment, because it fails as a matter of law. Specifically,
 20 Plaintiff's moving papers fail to comply with court rules and make no mention of TWC's multiple
 21 objections to each disputed interrogatory, which alone requires Plaintiff's motion be denied.
 22 Plaintiff does not even fully address the one objection by TWC which he challenges, TWC's
 23 limitation of its responses to the San Diego/Desert Cities areas.

24 Under California Rules of Court Rule 3.1020(c) ("Rule 3.1020(c)"), a motion to compel
 25 further responses to interrogatories *must* be accompanied by a separate statement that is "full and
 26 complete so that no person is required to review any other document in order to determine the full
 27 request and the full response." It must also set forth "the text of each response, answer, or

28 ////

1 objection” and a “statement of the factual and legal reasons for compelling further responses,
2 answers, or production *as to each matter in dispute.*” Rule 3.1020(c)(2)-(3)(emphasis added).

3 Plaintiff’s unique separate statement does not comply with the statute. Rather than setting
4 forth verbatim each response and every objection made by TWC to Plaintiff’s interrogatories, the
5 separate statement paraphrases TWC’s responses and fails to address *any* of TWC’s specific
6 objections to each interrogatory. The sole objection Plaintiff challenges—TWC’s general
7 objection limiting its responses to “TWC-SAN DIEGO/DESERT CITIES,” is not even set forth
8 in Plaintiff’s Separate Statement. Plaintiff included merely an excerpt of TWC’s responses
9 and/or objections that indicates “TWC-SAN DIEGO/DESERT CITIES objects to this
10 interrogatory” and/or “TWC-SAN DIEGO/DESERT CITIES responds as follows,” not
11 addressing the objection behind such excerpts:

12 TWC-SAN DIEGO/DESERT CITIES objects to Plaintiff’s
13 purported definition of the terms “YOU,” and “YOUR” on the
14 ground that it renders each interrogatory including these terms to be
15 vague and ambiguous, as well as overly broad. The definition is so
16 overbroad that it appears to call for information from literally
17 hundreds of different corporate entities and their privileged
18 communications with their counsel. TWC—SAN
19 DIEGO/DESERT CITIES shall construe the terms “YOU,” and
20 “YOUR,” when used in the interrogatories, to mean Time Warner
21 Entertainment-Advance/Newhouse Partnership, a New York
22 general partnership, through its San Diego Division (“TWC—SAN
23 DIEGO/DESERT CITIES”), which operates in the San Diego and
24 Desert Cities areas, dba Time Warner Cable and no other person or
25 entity.

26 Presumably, Plaintiff’s failed to address the entirety of the above objection because it is valid.
27 Had TWC not restricted its responses to “TWC-SAN DIEGO/DESERT CITIES” and answered
28 the interrogatories as requested, it may have been forced to provide clearly irrelevant and
29 burdensome information about *all* TWC entities throughout the state and perhaps even the
30 nation—or simply object to all the interrogatories and provide no answers at all. However, in an
31 attempt to provide Plaintiff with as much relevant and responsive information as possible, TWC
32 answered only on behalf of the TWC Division with whom Plaintiff had accounts.

33 Additionally, in responding to each interrogatory at issue, TWC made multiple objections
34 that were tailored to each specific interrogatory. Plaintiff’s separate statement does not set forth

1 any of the general or specific objections to each interrogatory in dispute, let alone address why
 2 such objections should not apply. Plaintiff merely claims that "each of the responses incorporates
 3 the following prefatory language which is used to improperly limit the response to only the San
 4 Diego and Desert Cities areas." (Motion to Compel, p. 11, ll. 12-13.)⁴ This is simply not
 5 sufficient.

6 Plaintiff cannot seek to compel further responses by cherry-picking only certain responses
 7 made by TWC and ignoring its other responses and objections to the same interrogatories. *See*
 8 Cal. Rule of Court Rule 3.1020(c)(2)-(3). California law requires that the separate statement
 9 address each of the objections for the interrogatories in dispute. *Id.* Plaintiff has not done this,
 10 and thus his motion to compel should be denied.

11 In ruling on a motion to compel, the court must rule on each objection separately. *See*
 12 Robert I. Weil et al., *California Practice Guide: Civil Procedure Before Trial* ¶ 8:1182, at 8F-72
 13 (The Rutter Group, 2007). It is an abuse of discretion to fully grant a motion to compel if *any* of
 14 the objections to a discovery request are valid. *Deaile v. General Telephone Co. of Calif.*, 40 Cal.
 15 App. 3d 841, 851 (1974). A court may deny "in toto" the motion to compel further answers
 16 where the questions are objectionable in their entirety. *Id.*

17 Neither Plaintiff's motion to compel nor his separate statement set forth or address *any* of
 18 TWC's individual objections to each interrogatory. In fact, it appears that Plaintiff only takes
 19 issue with one of TWC's general objections pertaining to Plaintiff's overly broad definition of
 20 "YOU" and "YOUR." However, even in attacking that one general objection, Plaintiff does not
 21 provide the full text of TWC's objection. Rather, he merely sets forth the restrictive language in
 22 the responses that reflect TWC's objection. Thus, because Plaintiff has not challenged the
 23 sufficiency of each of TWC's objections, and because the motion to compel must be denied if
 24 even *one* of the objections is valid, it would be improper for the court to grant Plaintiff's motion
 25 as presented.

26 ////

27 ⁴ Plaintiff also contends that TWC conceded the propriety of each interrogatory by answering all of the questions but
 28 limiting its answers to only San Diego and the Desert Cities. (Motion to Compel, p. 11, ll. 26-27.) Such assertion is
 mistaken, since TWC made specific objections to each and every interrogatory in dispute.

1 Finally, with respect to Plaintiff's argument that "Time Warner Cable, Inc., a Delaware
 2 Corporation" is the defendant in this case and should have answered the discovery requests
 3 instead of TWC, it should be noted that TWC pointed out at the commencement of this litigation
 4 that Plaintiff's naming of Time Warner Cable, Inc. was in error. Time Warner Cable, Inc. is not
 5 the entity that owns and operates the cable business in San Diego. Rather than demurrer to
 6 Plaintiff's pleadings due to his error in identifying the correct corporate entity, TWC answered
 7 Plaintiff's amended complaint with the explanation that it had been "erroneously sued as Time
 8 Warner Cable, Inc." Plaintiff made no objection, nor has Plaintiff at anytime in this litigation
 9 objected to TWC's involvement in this litigation as the defendant erroneously sued as "Time
 10 Warner Cable, Inc." If Plaintiff wishes to proceed against Time Warner Cable, Inc. and not
 11 TWC, TWC requests a dismissal with prejudice from this lawsuit. Furthermore, Plaintiff's
 12 motion should be denied, as Time Warner Cable, Inc. has not been served with Plaintiff's
 13 operative complaint, nor has it entered an appearance in this case.

14 Dated: March 21, 2008

DLA PIPER US LLP

15
16
17 By 

JEFFREY M. SHOHE
 JULIE L. HUSSEY
 CARRIE S. DOLTON
 RYAN T. HANSEN
 Attorneys for Defendant
 TIME WARNER ENTERTAINMENT-
 ADVANCE/NEWHOUSE PARTNERSHIP, A
 NEW YORK GENERAL PARTNERSHIP,
 THROUGH ITS SAN DIEGO DIVISION,
 DBA TIME WARNER CABLE

1 JEFFREY M. SHOHE (Bar No. 067529)
2 JULIE L. HUSSEY (Bar No. 237711)
3 CARRIE S. DOLTON (Bar No. 234298)
4 **DLA PIPER US LLP**
5 401 B Street, Suite 1700
6 San Diego, CA 92101-4297
7 Tel: 619.699.2700
8 Fax: 619.699.2701

FILED
SAN DIEGO SUPERIOR COURT
APR 21 2008
CLERK OF THE SUPERIOR COURT
BY C. CHEELY

6 Attorneys for Defendant
7 TIME WARNER ENTERTAINMENT-ADVANCE/
8 NEWHOUSE PARTNERSHIP, A NEW YORK
9 GENERAL PARTNERSHIP, THROUGH ITS SAN
10 DIEGO DIVISION, DBA TIME WARNER CABLE

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

12 LEON ALPERT, an individual, on behalf
13 of himself, on behalf of all those similarly
14 situated, and on behalf of the general
15 public,

16 Plaintiffs,

17 v.

18 TIME WARNER CABLE, INC., a
19 Delaware corporation, and DOES 1 TO
20 100,

21 Defendants.

CASE NO. GIC881621

**DECLARATION OF TERRI RHODES IN
SUPPORT OF TWC'S OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL
FURTHER RESPONSES TO
INTERROGATORIES**

Date: April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

1 I, Terri Rhodes, declare:

2 1. I am Director of Marketing at Time Warner Entertainment-Advance/Newhouse
3 Partnership, a New York general partnership, through its San Diego Division, dba Time Warner
4 Cable ("TWC-SAN DIEGO/DESERT CITIES"). I have personal knowledge of the facts set
5 forth herein and, if called to testify, I could and would testify competently thereto.

6 2. Time Warner Cable is a decentralized company. There are many divisions of
7 Time Warner Cable across the United States, and each separate division acts as a separate and
8 distinct entity.

9 3. The separate divisions have separate marketing, finance, customer service, and
10 human resources departments.

11 4. The separate divisions have separate budgets with their own expenses and
12 revenues.

13 5. The separate divisions have separate pricing policies and procedures.

14 6. The separate divisions have separate marketing policies and procedures.

15 7. The separate divisions have separate components, products and packages of
16 services from the other divisions.

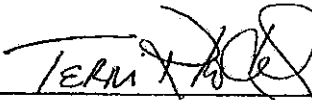
17 8. The separate divisions train their customer service representatives separately.

18 9. Leon Alpert has two accounts in the San Diego/Desert Cities division.

19 10. TWC-SAN DIEGO/DESERT CITIES, the division with whom Plaintiff Alpert
20 has two accounts, provides cable services only in the San Diego and Desert Cities areas in
21 California.

22 11. The TWC-SAN DIEGO/DESERT CITIES division does not provide cable
23 services to other California locations.

24 I declare under penalty of perjury under the laws of the State of California and the United
25 States of America that the foregoing is true and correct and that this declaration was executed on
26 March 20, 2008, in San Diego, California.

27 
28 Terri Rhodes

1 JEFFREY M. SHOHE (Bar No. 067529)
2 JULIE L. HUSSEY (Bar No. 237711)
3 CARRIE S. DOLTON (Bar No. 234298)
4 DLA PIPER US LLP
5 401 B Street, Suite 1700
6 San Diego, CA 92101-4297
7 Tel: 619.699.2700
8 Fax: 619.699.2701

FILED
SAN DIEGO COUNTY COURT
MAY 21 2008
CLERK OF THE SAN DIEGO COUNTY
BY C. CHASEY

6 Attorneys for Defendant
7 TIME WARNER ENTERTAINMENT-ADVANCE/
8 NEWHOUSE PARTNERSHIP, A NEW YORK
9 GENERAL PARTNERSHIP, THROUGH ITS SAN
10 DIEGO DIVISION, DBA TIME WARNER CABLE

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

12 LEON ALPERT, an individual, on behalf
13 of himself, on behalf of all those similarly
14 situated, and on behalf of the general
15 public,

15 Plaintiffs,

16 v.

17 TIME WARNER CABLE, INC., a
18 Delaware corporation, and DOES 1 TO
19 100,

19 Defendants.

CASE NO. GIC881621

**DECLARATION OF JULIE L. HUSSEY IN
OPPOSITION TO PLAINTIFF'S MOTION
TO COMPEL FURTHER RESPONSES TO
INTERROGATORIES**

Date: April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

SDV1786515.1

DLA PIPER US LLP
SAN DIEGO

DECLARATION OF JULIE L. HUSSEY IN OPPOSITION TO MOTION TO COMPEL FURTHER RESPONSES
TO INTERROGATORIES

EXHIBIT B 48

1 I, Julie L. Hussey, declare and state as follows:

2 1. I am an attorney duly admitted to practice law in the State of California, and
3 admitted to appear before this Court. I am a partner with the law firm of DLA Piper US LLP,
4 attorneys of record for Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a
5 New York general partnership, through its San Diego Division, dba Time Warner Cable ("TWC")
6 in the above-captioned action. I have personal knowledge of the facts set forth herein and, if
7 called to testify, I could and would testify competently thereto.

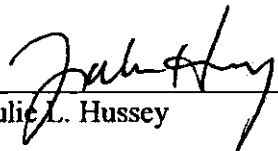
8 2. On February 27, 2007, as a good faith effort to meet and confer, I discussed with
9 Barron Ramos, counsel for Plaintiff, the issue of limiting the scope of Plaintiff's Interrogatories to
10 the San Diego/Desert Cities Division with the possibility that after the resolution of TWC's
11 pending Motion for Summary Judgment, such discovery would be unnecessary. Mr. Ramos
12 refused to consider limiting the scope of Plaintiff's discovery to the San Diego/Desert Cities
13 Division.

14 3. Attached hereto as Exhibit A is a true and correct copy of an email I sent to Mr.
15 Ramos on March 4, 2008 stating that any discovery pertaining to information outside of the San
16 Diego/Desert Cities Division is irrelevant and improper at this time.

17 4. Attached hereto as Exhibit B is a true and correct copy of an email exchange
18 between Barron Ramos, counsel for Plaintiff, and me that took place on March 5, 2008 and
19 March 6, 2008 regarding the scope of discovery.

20 5. Attached hereto as Exhibit C is a true and correct copy of excerpts from the
21 deposition of Leon Alpert taken on November 6, 2007.

22 I declare under penalty of perjury under the laws of the State of California and the United
23 States of America that the foregoing is true and correct and that this declaration was executed on
24 March 20, 2008, in San Diego, California.

25
26 
27 Julie L. Hussey

28 SD\1786515.1

- 1 -

EXHIBIT A

EXHIBIT B 50

Dolton, Carrie

From: Hussey, Julie
Sent: Tuesday, March 04, 2008 4:18 PM
To: 'barron@yourclasscounsel.com'
Cc: Shohet, Jeffrey
Subject: Alpert v. Time Warner - Interrogatories, PMK Deposition and MSJ hearing

Barron -

One of your letters today indicated that we have not yet responded to your meet and confer efforts. To be clear, we talked last week for some time and discussed the interrogatory responses, PMK and other varied matters. As discussed last week, discovery outside of the San Diego division is irrelevant and improper at this time. When we spoke last week in response to your meet and confer letter, I notified you that unless the court's order on the Motion to Compel Compliance indicated that we should do so, Time Warner will not agree to respond to the overly broad interrogatories on behalf of the decentralized and varied California divisions. While we have not yet seen the court's order on the Motion to Compel Compliance that you described, Time Warner will not agree to respond to the subject interrogatories on behalf of all of California at this time and will continue to limit its responses to the San Diego Division.

Additionally, last week I requested that Plaintiff limit the initial PMK deposition to only the San Diego division and Plaintiff declined. Time Warner is willing and plans to move forward with the noticed PMK deposition on or about March 14 for the San Diego division only so that Plaintiff may obtain the necessary discovery to respond to the pending Motion for Summary Judgment. Time Warner will produce a PMK for the San Diego division on or about March 14. We are still working with the witness to determine what the schedule allows. Time Warner plans to move the court for a protective order staying all discovery outside the San Diego division until the MSJ is ruled upon.

Finally, the scope of the MSJ is limited and Plaintiff has had months to conduct discovery. Time Warner has produced documents, responded to the written discovery for the San Diego division and agreed to produce a PMK for the San Diego division so that Plaintiff may complete all discovery regarding the MSJ. Time Warner will not agree to move the hearing date to accommodate the requested irrelevant and improper discovery.

Please let me know if you have any questions regarding any of the issues above.

Julie



Julie L. Hussey
Partner
DLA Piper US LLP
401 B Street, Suite 1700
San Diego, California 92101
619 589.2844 T
619 764 6644 F
Julie.Hussey@dlapiper.com
www.dlapiper.com

3/6/2008

EXHIBIT B

Hussey, Julie

From: barron@yourclasscounsel.com
Sent: Thursday, March 06, 2008 10:12 AM
To: Hussey, Julie
Subject: RE: Alpert v. Time Warner - Interrogatories, PMK Deposition and MSJ hearing

Julie,

Your position that the Court has somehow limited discovery to San Diego is simply wrong. The Court's denial of the motion was "without prejudice" and dealt only with Jeff's procedural argument re the Notice of Motion (which was wrong per Cal. Supreme Court case law and I will now likely bring a renewed motion accordingly). In any event, why you insist this is a San Diego only case is beyond me and is contrary to the pleadings.

As for the rog responses, I am calendaring a motion to compel as I said I would given your refusal yesterday to fully respond to those rogs. Now that your position is clear, the motion will be filed.

With regard to the PMK depo, we will take it as noticed at Dave's office downtown with the understanding that the limitation to San Diego is only an accommodation to you and does not waive our right to your PMK for all of Calif.

Lastly, you indicated to me clearly that if the previously heard motion was in our favor, Time Warner would no longer dispute the scope of discovery outside of San Diego. That's what you said, no question about it. If your position is different now, that's fine, I understand how things operate over there.

I'll serve the rog motion as soon as I get a hearing date and look forward to the PMK depo next week. Let me know if you have any questions or concerns re anything above.

Barron

>
> Barron --
>
> I am glad that you wrote me with your understanding of our conversation
> last week so that we can get on the same page.
> Yes, Time Warner would have been willing to accommodate an extension on
> the MSJ hearing if the court had ruled in plaintiff's favor on the
> Motion to Compel Compliance. Had Time Warner been ordered to produce
> more documents under the court's decision, an extension would have been
> acceptable. As you know, such motion was denied so we are not clear
> what outstanding discovery you seek that will be allowed beyond San
> Diego. So, to summarize, yes, we would have accommodated outstanding
> discovery/MSJ hearing change if such outstanding discovery or the
> requirement of a last minute production ordered by the court existed.
> None exists at this time so we plan to move forward.
>
> Secondly, yes, we told you that we had been waiting/were waiting until
> the court's ruling on the Motion to Compel Compliance so that we could
> respond to the interrogatory meet and confer letter. I asked that you
> give us a few more days to respond so we could use the order as a
> guideline. As discussed, we were waiting on the ruling so that we had
> guidance on whether the court was expanding discovery to all of
> California. I told you that if the court ruled for plaintiff and
> expanded the scope of the RFP then we would probably not require a

> motion to compel further interrogatory responses. I never once said or
> indicated that if the court's ruling was in Time Warner's favor that we
> would strangely change our position and then respond on behalf of all
> California to your pending discovery. In fact, you asked me a similar
> question, I explained our position and then you said "well it sounds
> like I need to continue with my draft motion" and I agreed. What part
> of this is/was misleading? We got the ruling (from your description in
> the faxed letter) and then we immediately responded to your meet and
> confer letter letting you know we would not expand the interrogatory
> responses because the court ruled in our favor.
>
> We simply disagree regarding your third point. Time Warner has
> responded to all discovery requests timely and in good faith, despite
> your meritless accusations. The case has been pending for almost one
> year and Time Warner's position regarding the scope of discovery has
> been clear since the beginning: San Diego division only.
>
> If plaintiff has issues regarding Time Warner's Interrogatory responses
> other than the difference of opinion regarding the limitation of the
> scope (San Diego v. California) then please let me know and we will do
> our best to accommodate your request.
>
> Finally, in response to your email from this morning (attached), the PMK
> witness is available on March 14 at 10:00 am to respond on behalf of San
> Diego and we prefer to produce our witness at the DLA Piper downtown San
> Diego office. Please advise us if this is not acceptable. We will plan
> for the deposition to move forward on March 14.
>
> Regards,
>
>
> Julie
>
>
> -----Original Message-----
> From: barron@yourclasscounsel.com [mailto:barron@yourclasscounsel.com]
> Sent: Wednesday, March 05, 2008 9:08 AM
> To: Hussey, Julie
> Subject: Re: Alpert v. Time Warner - Interrogatories, PMK Deposition and
> MSJ hearing
>
> Julie,
>
> There are so many mistatements in your e-mail that it's hard to know
> where
> to begin.
>
> First, you told me long ago that your client would have no problem
> moving
> the MSJ date back to accomodate discovery matters. That's suddenly
> changed.
>
> Second, you told me when we spoke last week that the reason you had not
> replied to my meet and confer letters was because you were waiting to
> see
> what the Court would do re my pending motion to compel. Specifically,
> you
> indicated that if the Court limited discovery to San Diego you would
> limit future discovery accordingly. On other other hand, you were quite
> clear that if the Court did not limit discovery to San Diego (which he
> did
> not), you would not fight us on the scope of discovery outside of San
> Diego. Now, again, that's suddenly changed as well.
>
> Third, permit me to correct your misperception of reality - we have not
> had "months" to conduct discovery since that statement necessarily
> implies

> that you will properly respond to same. You did not. Specifically,
> (i) you failed to produce responsive documents necessitating the motion
> to
> compel which was just heard last week on an order shortening time, (ii)
> those responsive documents are still outstanding and necessary to
> adequately prepare our MSJ opp, (iii) you have failed to respond to our
> rogs in full thereby necessitating another motion to compel, and (iv)
> you
> have failed to agree to the noticed date for the PMK depo and have
> already
> indicated you will limit the scope of inquiry.
>
> It looks like saying one thing and then doing another is how you all do
> business over there. I sure don't understand that approach, but I guess
> I
> have to learn to deal with it.
>
> I'll be in touch as to how we intend to proceed given your change in
> positions on these issues and refusal to permit discovery necessary to
> oppose your MSJ.
>
> Barron
>
>
>
>
>
>>
>>
>> Barron -
>>
>> One of your letters today indicated that we have not yet responded to
>> your meet and confer efforts. To be clear, we talked last week for
> some
>> time and discussed the interrogatory responses, PMK and other varied
>> matters. As discussed last week, discovery outside of the San Diego
>> division is irrelevant and improper at this time. When we spoke last
>> week in response to your meet and confer letter, I notified you that
>> unless the court's order on the Motion to Compel Compliance indicated
>> that we should do so, Time Warner will not agree to respond to the
>> overly broad interrogatories on behalf of the decentralized and varied
>> California divisions. While we have not yet seen the court's order on
>> the Motion to Compel Compliance that you described, Time Warner will
> not
>> agree to respond to the subject interrogatories on behalf of all of
>> California at this time and will continue to limit its responses to
> the
>> San Diego Division.
>>
>> Additionally, last week I requested that Plaintiff limit the initial
> PMK
>> deposition to only the San Diego division and Plaintiff declined.
> Time
>> Warner is willing and plans to move forward with the noticed PMK
>> deposition on or about March 14 for the San Diego division only so
> that
>> Plaintiff may obtain the necessary discovery to respond to the pending
>> Motion for Summary Judgment. Time Warner will produce a PMK for the
>> San Diego division on or about March 14. We are still working with
> the
>> witness to determine what the schedule allows. Time Warner plans to
>> move the court for a protective order staying all discovery outside
> the
>> San Diego division until the MSJ is ruled upon.
>>
>> Finally, the scope of the MSJ is limited and Plaintiff has had months
> to

>> conduct discovery. Time Warner has produced documents, responded to
> the
>> written discovery for the San Diego division and agreed to produce a
> PMK
>> for the San Diego division so that Plaintiff may complete all
> discovery
>> regarding the MSJ. Time Warner will not agree to move the hearing
> date
>> to accommodate the requested irrelevant and improper discovery.
>>
>> Please let me know if you have any questions regarding any of the
> issues
>> above.
>>
>> Julie
>>
>>
>> <<http://www.dlapiper.com/>>
>>
>> Julie L. Hussey
>> Partner
>>
>> DLA Piper US LLP
>> 401 B Street, Suite 1700
>> San Diego, California 92101
>>
>> 619.699.2844 T
>> 619.764.6644 F
>> Julie.Hussey@dlapiper.com
>>
>> www.dlapiper.com <<http://www.dlapiper.com/>>
>>
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>>
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>> Thank you.
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>
>
>
>
> --
> BARRON E. RAMOS
> Attorney at Law, A Professional Corporation
> 132 N. El Camino Real, # 303
> Encinitas, California 92024

> Phone (760) 274-6438
> Mobile (858) 349-6019
> Fax (760) 994-1354

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>

--
BARRON E. RAMOS
Attorney at Law, A Professional Corporation
132 N. El Camino Real, # 303
Encinitas, California 92024
Phone (760) 274-6438
Mobile (858) 349-6019
Fax (760) 994-1354

EXHIBIT C

EXHIBIT B 58

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CENTRAL DIVISION

LEON ALPERT, an individual, on
behalf of himself, on behalf of
all those similarly situated,
and on behalf of the general
public,

Plaintiff,

vs.

Case No. GIC881621

TIME WARNER CABLE, INC., a
Deleware corporation, and DOES
1 TO 100,

Defendants.

CERTIFIED
COPY

VIDEOTAPED DEPOSITION OF LEON SETH ALPERT

VOLUME 1

SAN DIEGO, CALIFORNIA

TUESDAY, NOVEMBER 6, 2007

Reported by:
R. Denise Marlow
CSR No. 11631

Job No. 75324

LEON SETH ALPERT

11/06/07

1 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
2 CENTRAL DIVISION
3

4 LEON ALPERT, an individual, on
5 behalf of himself, on behalf of
6 all those similarly situated,
7 and on behalf of the general
8 public,

9 Plaintiff,

10 vs.

Case No. GIC881621

11 TIME WARNER CABLE, INC., a
12 Delaware corporation, and DOES
13 1 TO 100,

14 Defendants.
15

16 DEPOSITION OF LEON SETH ALPERT, Volume 1, taken
17 at 401 B Street, Suite 1700, San Diego, California, on
18 Tuesday, November 6, 2007, at 9:39 a.m., before
19 R. Denise Marlow, Certified Shorthand Reporter, in and
20 for the State of California.
21
22
23
24
25

LEON SETH ALPERT

11/06/07

1 **Appearances:**

2 **For Plaintiff:**

3 Law Office of Barron E. Ramos
4 By: Barron E. Ramos
5 132 North El Camino Real, Suite 303
6 Encinitas, California 92024
7 760.274.6438 Fax 760.994.1354
8 E-mail: Barron@yourclasscounsel.com

9 - and -

10 Clark & Markham, LLP
11 By: David R. Markham
12 401 West A Street, Suite 2200
13 San Diego, California 92101
14 619.239.1321 Fax 619.239.5888
15 E-mail: Dmarkham@clarkmarkham.com

16 **For Defendant:**

17 DLA Piper US LLP
18 By: Jeffrey M. Shohet
19 - and -
20 Carrie S. Dolton
21 401 B Street, Suite 1700
22 San Diego, California 92101-4297
23 619.699.2859 Fax 619.764.6659
24 E-mail: Jeffrey.shohet@dlapiper.com

25 **Also Present:**

 Victor Renteria, Videographer

LEON SETH ALPERT

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10:56:59 1 Q Well, there might have been a purpose to change
10:57:01 2 the billing for those services.

10:57:02 3 MR. RAMOS: Well, objection. Calls for
10:57:04 4 speculation.

10:57:05 5 MR. SHOHEIT: I'm just suggesting there might
10:57:08 6 have been another purpose.

10:57:10 7 MR. RAMOS: Is there a question?

10:57:11 8 MR. SHOHEIT: No, there isn't. But there will
10:57:12 9 be.

10:57:12 10 BY MR. SHOHEIT:

10:57:12 11 Q And the question is, Were you aware of the
10:57:14 12 existence of a package of services called the Digipac
10:57:17 13 2000 at any time before Palm Springs Rental Agency began
10:57:22 14 to negotiate for it on your behalf?

10:57:24 15 A No, I wasn't aware.

10:57:36 16 Q Now, other than on behalf of your property in
10:57:43 17 Desert Cities and your primary residence in Del Mar, do
10:57:46 18 you contract for cable television services for any other
10:57:52 19 property?

10:57:53 20 A No.

10:58:05 21 Q What's the highest level of education that
10:58:07 22 you've attained?

10:58:08 23 A Master's degree.

10:58:09 24 Q In what?

10:58:10 25 A Economics.

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12:48:02 1 Q Mr. Alpert, I'm not quarreling that you are the
12:48:06 2 ultimate economic source of that payment. I simply want
12:48:10 3 you to agree with me on a fact that I think is not in
12:48:13 4 dispute. And that is the package of services that are
12:48:16 5 in the bulk multichannel video service group are
12:48:18 6 services that are provided to you through the HOA
12:48:22 7 payment that you make, and the additional services you
12:48:27 8 have to write a check for. That's all I'm trying to get
12:48:30 9 to. You agree with me on that, don't you?

12:48:32 10 A I --

12:48:32 11 MR. RAMOS: Sorry. Let me just object. The
12:48:34 12 document speaks for itself, and it's vague and
12:48:36 13 ambiguous.

12:48:37 14 THE WITNESS: If the scope of your question is
12:48:39 15 that outside of that -- excuse me -- that 28.77 I wrote
12:48:44 16 a check for to Time Warner every month, there is no
12:48:48 17 dispute because I, in fact, wrote a check for it every
12:48:51 18 month.

12:48:51 19 BY MR. SHOHEIT:

12:48:51 20 Q And those are the additional services above and
12:48:53 21 beyond the services that your HOA provides to you.

12:48:57 22 MR. RAMOS: Let me just object.

12:48:58 23 BY MR. SHOHEIT:

12:48:58 24 Q Correct?

12:48:59 25 MR. RAMOS: That calls for speculation because

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13:00:53 1 THE WITNESS: I didn't really think about it.

13:00:54 2 BY MR. SHOHEIT:

13:00:54 3 Q And just to clarify the record, you received
13:00:58 4 the services that are identified in this heading
13:01:02 5 "Digital Phone Package" as of the billing date of
13:01:05 6 February 12th, 2006. Correct?

13:01:06 7 A Correct.

13:01:07 8 Q And then for your iControl premium service,
13:01:11 9 that's your digital or your -- your pay services on
13:01:15 10 demand subscription of \$6.95, do you have any reason to
13:01:19 11 believe that there was a lower charge available to you
13:01:23 12 for that premium service ordered on -- on a standalone
13:01:29 13 or nonbundled basis?

13:01:30 14 MR. RAMOS: Same objection. It calls for
13:01:32 15 speculation.

13:01:32 16 BY MR. SHOHEIT:

13:01:32 17 Q In other words, the question really is, Do you
13:01:34 18 have any understanding that that is not the proper rate
13:01:37 19 that Time Warner charges for that service as part of a
13:01:41 20 nonbundled package?

13:01:42 21 MR. RAMOS: Calls for speculation.

13:01:43 22 THE WITNESS: No. I -- I mean, all I
13:01:45 23 understood was that I asked for, you know, a bundle of
13:01:48 24 those services, and then -- and they quoted me a rate or
13:01:55 25 I saw it on the ad or a combination, and that's the bill

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13:01:58 1 and that's what I paid.

13:01:59 2 BY MR. SHOHEIT:

13:01:59 3 Q You say you asked for a bundle of services.

13:02:05 4 And I understand -- well, tell me when you asked for the
13:02:09 5 bundle of services?

13:02:10 6 A I think when I first upgraded to the digital
13:02:17 7 phone and the wireless -- and the Road Runner, I -- I
13:02:22 8 wanted -- you know, wanted the extra movie channels and
13:02:26 9 the other stuff, so I believe that's when the whole
13:02:28 10 thing came up that way.

13:02:29 11 Q I never remember you -- when you answered my
13:02:31 12 questions about that, I don't remember your stating that
13:02:34 13 you specifically asked the customer service
13:02:36 14 representative about a bundle or bundled rate. Is it
13:02:39 15 your testimony that you did have that conversation with
13:02:42 16 the customer service rep?

13:02:44 17 A I may have. I may not have used the word
13:02:47 18 "bundle," or I may have. I just saw -- responded to the
13:02:51 19 ad in wishing to upgrade my services.

13:02:52 20 Q This is now going back to the 2004/2005 --

13:02:56 21 A Yeah. No, I understand.

13:02:58 22 Q I just wanted to be sure we were talking
13:03:00 23 about --

13:03:00 24 A No. I understand exactly what you're talking
13:03:02 25 about.

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13:04:18 1 A Yeah. Any four premium channels, yeah.

13:04:20 2 Q Okay. Now, you received all of those services
13:04:22 3 that are shown on this bill at the time of this billing.
13:04:26 4 Correct?

13:04:27 5 A As far as I recall, yes.

13:04:29 6 Q And then there was the Wireless Road Runner for
13:04:42 7 \$54.90. You see that?

13:04:42 8 A Yes, I do.

13:04:43 9 Q And you received that at the time as well.
13:04:44 10 Correct?

13:04:44 11 A When it worked, yes.

13:04:46 12 Q And you don't -- and as you sit here today, do
13:04:48 13 you have any understanding or belief that that was
13:04:52 14 available to you at some lower price than is charged
13:04:55 15 here for that service?

13:04:56 16 MR. RAMOS: Calls for speculation.

13:04:57 17 THE WITNESS: I didn't think about it. I mean,
13:05:00 18 I just saw the ad, talked to the customer service, and
13:05:04 19 decided that's what I wanted and paid for it.

13:05:05 20 BY MR. SHOHET:

13:05:05 21 Q All right. So you agree with me, then, that
13:05:11 22 you received all of the services -- when they were good,
13:05:14 23 when you got the signals, you did receive all the
13:05:17 24 services that are shown on your February 12th, 2006,
13:05:19 25 bill. Correct?

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13:05:20 1

A Yes.

13:05:21 2

Q And you received them and paid the price that's

13:05:24 3

shown on this bill. Correct?

13:05:25 4

A Correct.

13:05:26 5

Q Now, do you recall seeing rate cards or rate

13:05:29 6

sheets being sent to you periodically from Time Warner

13:05:33 7

Cable regarding what the current pricing or rates were

13:05:37 8

for Time Warner services?

13:05:38 9

A Hmm. You know, they -- they continually

13:05:47 10

advertise stuff, so -- and they -- there's always

13:05:51 11

inserts of one sort or another in the billing and I see

13:05:55 12

ads. So, you know, on a broad, broad sense, yeah, I was

13:06:03 13

aware that they advertised rates.

13:06:05 14

Q So you did from time to time receive some

13:06:09 15

information from some source about rates and rate

13:06:12 16

changes from Time Warner?

13:06:13 17

A I imagine so. I can't point to anything

13:06:17 18

specifically but just in the normal course of how they

13:06:19 19

do business.

13:06:19 20

Q And at any time between the time you started

13:06:25 21

contracting with Time Warner Cable for additional

13:06:29 22

services as a homeowner resident -- homeowners

13:06:34 23

association resident, do you recall that the rates

13:06:36 24

changed, again, before the September rate change?

13:06:39 25

A Not specifically.

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LEON SETH ALPERT

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13:08:43 1 Q Exactly. Exhibit 3 and Exhibit --

13:08:43 2 A No, not that I recall.

13:08:43 3 Q Or a document similar to Exhibit 4. Did you

13:08:48 4 ever do a comparison of the rates that you were being

13:08:51 5 charged to a rate sheet or the rate card that you were

13:08:52 6 given?

13:08:52 7 A Not that I recall.

13:08:54 8 Q Turn to the second page.

13:08:55 9 A Okay.

13:08:56 10 Q You see it's 39.95 for digital phone?

13:09:01 11 A Yes.

13:09:01 12 Q With digital cable and Road Runner. Do you see

13:09:04 13 that?

13:09:04 14 A Digital phone with digital cable and Road

13:09:07 15 Runner, 39.95 per month.

13:09:09 16 Q You see that?

13:09:10 17 A Yeah.

13:09:10 18 Q And --

13:09:11 19 A But there's two lines. One says -- or Road

13:09:15 20 Runner. Okay.

13:09:16 21 Q In other words, if you buy the bundle of

13:09:18 22 digital phone along with Road Runner, you get the

13:09:20 23 digital phone for 39.95. Do you see that?

13:09:24 24 A Yes.

13:09:25 25 Q And does that refresh your recollection that

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13:09:27 1 you ever made a comparison with the rate for your
13:09:29 2 digital phone service to any published or rate card rate
13:09:34 3 to determine whether you were properly being charged for
13:09:36 4 that?

13:09:36 5 MR. RAMOS: Objection. Asked and answered.

13:09:37 6 THE WITNESS: I -- you know, when I first
13:09:41 7 ordered these services in a bundle, I believe I probably
13:09:46 8 checked my bill against what I was told, and it was
13:09:49 9 probably correct, and then I never --

13:09:51 10 BY MR. SHOHEIT:

13:09:51 11 Q All right.

13:09:51 12 A I look at my bill every month, but I never --
13:09:54 13 you know, I didn't notice any big changes, so --

13:09:58 14 Q And then at the bottom of the first page where
13:10:03 15 it says high-speed Internet service --

13:10:05 16 A Yeah.

13:10:05 17 Q -- Road Runner 44.95, and then the wireless is
13:10:09 18 9.95, which totals 54.90, do you see that?

13:10:13 19 A Yes.

13:10:14 20 Q And did you ever make that comparison against
13:10:16 21 what you were being charged for Wireless Road Runner to
13:10:19 22 see if you were being charged the correct rate card
13:10:23 23 rate?

13:10:23 24 A I most likely compared it on the first bill
13:10:27 25 after I ordered the services to make sure I was being

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13:10:29 1 charged correctly, but I don't recall anytime since
13:10:31 2 then.

13:10:31 3 Q Okay.

13:10:32 4 A But I don't recall ever seeing this rate card.

13:10:34 5 Q What did you compare it to then?

13:10:37 6 A Either -- maybe I wrote it down, what I was
13:10:40 7 told by the customer service rep, or maybe I had an -- I
13:10:43 8 had an ad or something that --

13:10:44 9 Q Okay.

13:10:45 10 A -- an insert or something else. But I don't
13:10:47 11 recall specifically a detail rate card.

13:10:49 12 Q All right. Whatever comparison you were making
13:10:51 13 to, whether it was the ad or the rate card or some other
13:10:54 14 document, you did that kind of a comparison when you
13:10:56 15 first received the bill, and you were satisfied that the
13:11:00 16 rates were as they were advertised or represented to be?

13:11:03 17 A Yes, because I paid the bill without dispute
13:11:07 18 every month.

13:11:08 19 Q Okay. And then just to complete the line of
13:11:19 20 questioning on this, let me show you Exhibit 4 --

13:11:32 21 THE REPORTER: 5.

13:11:32 22 MR. SHOHEIT: 5. Excuse me. Exhibit 5. Thank
13:11:32 23 you.

13:11:32 24 (Exhibit 5 marked)

13:11:32 25 THE WITNESS: All right. Thank you.

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13:11:39 1

BY MR. SHOHET:

13:11:44 2

Q This is, for the record, a bill to you for your

13:11:59 3

Caminito del Canto residence, dated December 12th, 2006.

13:12:03 4

Do you recognize it as such?

13:12:04 5

A Yes.

13:12:04 6

Q And on the second page it identifies the HOA

13:12:10 7

Digipac 4000 Trio. Correct?

13:12:12 8

A Yes.

13:12:12 9

Q And this is a bill that is similar to, in terms

13:12:17 10

of the identification of the Digipac 4000 Trio combo,

13:12:23 11

that is a bill -- this bill represents the billing after

13:12:26 12

the change as a result of your conversation with Time

13:12:30 13

Warner in or about September. Correct?

13:12:32 14

A Yeah.

13:12:33 15

Q Now, it -- and in your -- in your complaint in

13:12:43 16

paragraph 12 of your complaint, you state that this

13:12:46 17

changed the billing to reflect what it should have been

13:12:49 18

all along. Right?

13:12:50 19

A Believe so, yes.

13:12:51 20

Q So you don't dispute the correctness of this

13:12:54 21

bill from this point forward.

13:12:57 22

A The new -- you mean Exhibit --

13:13:00 23

Q The bill -- the billing that's reflected in

13:13:03 24

Exhibit 12 -- I'm sorry -- in Exhibit 5 --

13:13:05 25

A Exhibit 5.

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13:13:06 1 Q -- which is dated December 12th, which you
13:13:08 2 identified as similar to the billings that you began to
13:13:12 3 receive after the phone call in September with Time
13:13:14 4 Warner Cable, this now correctly, in your view, charges
13:13:18 5 you for these services. Is that right?

13:13:19 6 A I believe so, yes.

13:13:20 7 Q All right. And now I want to understand one
13:13:26 8 thing that I've been confused about, I have to tell you,
13:13:29 9 since I first began this case --

13:13:30 10 A Okay.

13:13:31 11 Q -- in reading the complaint. Is it your
13:13:36 12 contention that the reduction in the bill is somehow
13:13:39 13 because before the change you were being charged for
13:13:45 14 services to which you were already entitled because your
13:13:48 15 HOA contracted for those services and paid \$28.77 on
13:13:54 16 your behalf? Is that your testimony?

13:13:56 17 A My understanding is that I understood that I
13:14:00 18 was being overcharged because there's -- had been some
13:14:05 19 sort of an agreement on pricing reflected by the notice
13:14:09 20 in the homeowners association newsletter and I was being
13:14:13 21 overcharged for that, purely just overcharged.

13:14:16 22 Q Okay. And the agreement related some special
13:14:19 23 pricing for the additional services above and beyond
13:14:23 24 what the HOA was paying on your behalf for as basic
13:14:28 25 services. Is that your understanding?

159

LEON SETH ALPERT

11/06/07

PENALTY OF PERJURY

I, LEON SETH ALPERT, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this ____ day of _____,
2007, at _____,
(City) (State)

LEON SETH ALPERT
Volume 1

172

SARNOFF COURT REPORTERS AND LEGAL TECHNOLOGIES
877.955.3855

EXHIBIT B 73

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

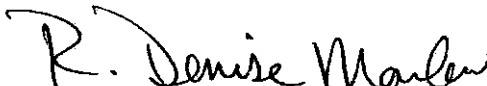
3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were duly sworn; that a record of the
7 proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 that the foregoing transcript is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to
12 the original transcript of a deposition in a Federal
13 Case, before completion of the proceedings, review of
14 the transcript [] was [] was not requested.

15 I further certify I am neither financially
16 interested in the action nor a relative or employee
17 of any attorney or party to this action.

18 IN WITNESS WHEREOF, I have this date
19 subscribed my name.

20
21 Dated: NOV 12 2007

22
23 
24 R. DENISE MARLOW
25 CSR No. 11631

FILED
SAN DIEGO SUPERIOR COURT
MAR 21 2008
CLERK OF THE COURT
BY G. CHASE

1 JEFFREY M. SHOHE (Bar No. 067529)
2 JULIE L. HUSSEY (Bar No. 237711)
3 CARRIE S. DOLTON (Bar No. 234298)
4 RYAN T. HANSEN (Bar No. 234329)
5 **DLA PIPER US LLP**
6 401 B Street, Suite 1700
7 San Diego, CA 92101-4297
8 Tel: 619.699.2700
9 Fax: 619.699.2701

10 Attorneys for Defendant
11 TIME WARNER ENTERTAINMENT-ADVANCE/
12 NEWHOUSE PARTNERSHIP, A NEW YORK
13 GENERAL PARTNERSHIP, THROUGH ITS SAN
14 DIEGO DIVISION, DBA TIME WARNER CABLE

9
10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SAN DIEGO

12 LEON ALPERT, an individual, on behalf
13 of himself, on behalf of all those similarly
14 situated, and on behalf of the general
15 public,

16 Plaintiffs,

17 v.

18 TIME WARNER CABLE, INC., a
19 Delaware corporation, and DOES 1 TO
20 100.

21 Defendants.

CASE NO. GIC881621

**DEFENDANT TIME WARNER CABLE'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFF'S RENEWED MOTION TO
COMPEL FURTHER RESPONSES [RE:
TIME WARNER CABLE'S RESPONSES
TO PLAINTIFF'S REQUESTS FOR
PRODUCTION OF DOCUMENTS]**

Date: April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

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Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a New York general partnership, through its San Diego Division, dba Time Warner Cable ("TWC"), sued erroneously as Time Warner Cable, Inc.¹ submits the following Memorandum of Points and Authorities in Opposition to Plaintiff's Renewed Motion to Compel Further Responses [Re: TWC's Responses to Plaintiff's Requests for Production of Documents] ("Renewed Motion to Compel").

I. INTRODUCTION.

This motion to compel is entirely frivolous, as it is clearly outside the required time limit in which to bring a motion to compel and, thus, must be denied as a matter of law. Whereas motions to compel must be filed within the mandatory and jurisdictional deadline of 45 days from the date of the discovery response, Plaintiff filed this motion 139 days after TWC provided the discovery response at issue. The law is clear that Plaintiff's motion is untimely and must be denied.

Plaintiff makes several desperate attempts in his moving papers to bypass the 45-day time limit and justify his tardy motion. First, Plaintiff characterizes his new motion as a "renewed" motion relating back to his previous motion to compel compliance. Plaintiff fails to explain how his new motion (seeking further responses) can be considered a renewal of the previous motion which was entirely different (seeking compliance with responses). Moreover, renewed motions are not exempt from the time limits established for such motions. Plaintiff cannot confer jurisdiction on this Court to grant an untimely motion by claiming some sort of "relation back" doctrine—for which he cites no authority.

////

¹ Plaintiff makes a reference in his moving papers that "Time Warner Cable, Inc., a Delaware Corporation" is the defendant in this case and should have answered the discovery requests instead of TWC. As pointed out by TWC at the commencement of this litigation, Plaintiff's naming of Time Warner Cable, Inc. was in error, as Time Warner Cable, Inc. is not the entity that owns and operates the cable business in San Diego. Rather than demurrer to Plaintiff's pleadings due to his error in identifying the correct corporate entity, TWC answered Plaintiff's amended complaint with the explanation that it had been "erroneously sued as Time Warner Cable, Inc." Plaintiff made no objection, nor has Plaintiff at anytime in this litigation objected to TWC's involvement in this litigation as the defendant erroneously sued as "Time Warner Cable, Inc." If Plaintiff wishes to proceed against Time Warner Cable, Inc. and not TWC, TWC requests a dismissal with prejudice from this lawsuit. Furthermore, Plaintiff's motion should be denied, as Time Warner Cable, Inc. has not been served with Plaintiff's operative complaint, nor has it entered an appearance in this case.

1 Plaintiff even goes so far as to use his moving papers to collaterally attack the Court's
 2 ruling on his previous motion to compel compliance. Plaintiff's attempt at showing error on the
 3 part of the Court and implicitly requesting reconsideration is improper and misplaced. Due to the
 4 jurisdictional time limit, Plaintiff's motion addressing the discovery requests at issue is untimely
 5 regardless of how it is styled. Furthermore, the Court did not err in its previous ruling denying
 6 Plaintiff's motion to compel compliance.

7 Similarly, Plaintiff's request for sanctions associated with bringing this untimely and
 8 unsupported motion is without merit. Conversely, TWC should be awarded sanctions to
 9 reimburse it for its costs in opposing this motion which seeks relief that cannot be granted as a
 10 matter of law. For all these reasons, TWC respectfully requests the Court deny Plaintiff's motion
 11 to compel and request for sanctions and award TWC its costs for opposing this motion.

12 **II. PROCEDURAL HISTORY.**

13 Plaintiff propounded his Requests for Production of Document, Set One, on or about
 14 September 17, 2007. (Declaration of Julie L. Hussey² ("Hussey Decl."), ¶ 2, Ex. A.) TWC
 15 responded to Plaintiff's requests on or about October 23, 2007. (Hussey Decl. ¶ 3, Ex. B.) On or
 16 about December 1, 2007, Plaintiff moved to compel compliance with TWC's responses. The
 17 court heard Plaintiff's motion to compel compliance on February 22, 2008, took it under
 18 submission, and issued its Order denying the motion on March 13, 2008 (the "Order"). Plaintiff
 19 now brings this motion, styled as a motion to "renew" his earlier motion, by filing a *different*
 20 motion to compel *further responses* to his September 17, 2007 document requests. Plaintiff filed
 21 the pending motion to compel further responses on March 10, 2008—139 days after TWC served
 22 its responses to Plaintiff's requests for production.

23 ////

24 ////

25 ////

26 ////

27 ² "Declaration of Julie L. Hussey" and "Hussey Decl." refers to the Declaration of Julie L. Hussey in Opposition to
 28 Plaintiff's Motion to Compel Further Responses [Re: TWC's Responses to Plaintiff's Requests for Production of Documents].

1 **III. PLAINTIFF HAS WAIVED HIS RIGHT TO COMPEL FURTHER RESPONSES.**

2 **A. Plaintiff's Motion is Time-Barred and Must be Denied As a Matter of Law.**

3 Plaintiff's motion to compel further responses must be denied because it is untimely.
 4 Section 2031.310(c) states that "[u]nless notice of this motion is given within 45 days of the
 5 service of the response, or any supplemental response, or on or before any specific later date to
 6 which the demanding party and the responding party have agreed in writing, *the demanding party*
 7 *waives any right to compel a further response to the inspection demand.*" Cal. Civ. Proc. Code
 8 § 2031.310(c)(emphasis added). The 45-day time limit runs from the date the response is served
 9 rather than the date set for production. *Standon Co., Inc. v. Sup. Ct. (Kim)*, 225 Cal. App. 3d 898,
 10 908 (1990). Additionally, the time limit is "mandatory and jurisdictional," and thus the court
 11 does not have authority to grant a late motion. *Sexton v. Sup. Ct. (Mullikin Med. Ctr.)*, 58 Cal.
 12 App. 4th 1403, 1410 (1997) (holding that the 45-day time limit is jurisdictional and "render the
 13 court without authority to rule on motions to compel other than to deny them"); *Profl Career*
 14 *Colleges, Magna Institute, Inc. v. Sup. Ct.*, 207 Cal. App. 3d 490, 492-93 (1989) (holding the
 15 45-day time limit is mandatory and jurisdictional).

16 The untimeliness of Plaintiff's motion is not even a close call. TWC responded to the
 17 requests for production that are the subject of Plaintiff's motion to compel on October 23, 2007.
 18 Plaintiff filed and served his moving papers on March 10, 2008—139 days after TWC served its
 19 responses. Thus, Plaintiff's motion is untimely and cannot be granted as a matter of law.

20 **B. Plaintiff's Attempts to Evade the 45-day Deadline for This Motion Are**
 21 **Without Merit.**

22 Plaintiff tries to bypass the mandatory 45-day deadline for bringing this motion to compel
 23 by relying on several novel, but meritless, arguments. First, Plaintiff characterizes his motion as a
 24 "*Renewed Motion to Compel Further Responses*" and implies that his tardy motion relates back to
 25 his previous motion to compel compliance. Second, Plaintiff argues that the denial of his
 26 previous motion to compel compliance "without prejudice" allows him to file this motion 139
 27 days after TWC's responses. Lastly, Plaintiff collaterally attacks the Court's Order denying his
 28

1 previous motion to compel compliance in an apparent attempt to petition for reconsideration of
2 that Order. All of these attempts to justify Plaintiff's tardy motion lack merit.

3 **1. Plaintiff's Motion is Not Timely as a "Renewed" Motion.**

4 **a. Plaintiff's "Renewed" Motion is An Entirely Different Motion.**

5 Plaintiff tries to evade the 45-day rule by calling this motion a "*Renewed* Motion to
6 Compel Further Responses" and implying that his tardy motion relates back to his previous
7 motion to compel compliance. Plaintiff's position in this regard is incorrect and entirely without
8 merit. As the Court pointed out in its Order denying Plaintiff's previous motion, the previous
9 motion was a "Motion to Compel Compliance" brought under section 2031.320(a)—not a
10 "Motion to Compel Further Responses" under section 2031.310. In response to Plaintiff's
11 attempts to characterize that motion as a motion to compel further responses rather than a motion
12 to compel compliance, the Court explained that it "cannot grant different relief, or relief on
13 different grounds, than stated in the notice of motion," and thus "Plaintiff's motion fails as a
14 Motion to Compel Compliance." (Order, p. 1.) Plaintiff did not previously bring a motion to
15 compel further responses. Accordingly, Plaintiff cannot now "renew" a motion that he never
16 brought in the first place.

17 **b. Plaintiff's New Motion Does Not Relate Back.**

18 Furthermore, Plaintiff's theory of a relation back doctrine applying to his new motion is
19 unsupported. Plaintiff cites no authority to support the theory that a "renewed" motion can
20 bypass the jurisdictional requirements of section 2031.310(c) and relate back to a previously filed
21 motion. Nor is TWC aware of any authorities supporting such a theory. In similar circumstances,
22 courts have found that motions filed after a jurisdictional time limit has expired do not relate back
23 to previously filed motions. *Beresh v. Sovereign Life Ins. Co. of Cal.*, 92 Cal. App. 3d 547, 551-
24 555 (1979); *Northridge Fin. Corp. v. Hamblin*, 48 Cal. App. 3d 819, 824-26 (1975).

25 In *Northridge Financial*, defendants filed a motion under section 473 for relief from a
26 default judgment six days prior to the six-month jurisdictional time limit for such a motion.
27 *Northridge Financial Corp.*, 48 Cal. App. 3d at 821-822. The trial court denied defendants'
28 motion, and defendants promptly filed a "motion for reconsideration," which by then was twenty-

1 four days after the six month time limit for a motion under section 473. *Id.* at 822. The trial court
 2 denied defendants' second motion on the grounds that it lacked jurisdiction to grant the motion
 3 because it was filed after the six-month time limit. *Id.*

4 On appeal, *Northridge Financial* affirmed the trial court's denial of defendants' second
 5 motion on jurisdictional grounds. Noting that there was no authority for a "motion for
 6 reconsideration" the court considered the second motion as a renewal of defendants' previous
 7 motion. *Id.* at 825. Because the "renewed" motion was filed after the six-month time limit for
 8 bringing a motion under section 473, the court held the motion was properly denied on
 9 jurisdictional grounds. *Id.* at 825-26 ("Since the second motion for relief was made after the
 10 prescribed period had expired, the court was without jurisdiction to act."). Although plaintiff
 11 argued that the trial court's ruling on the first motion came after the six-month time limit and,
 12 thus, precluded him from filing a "renewed" motion within the six-month period, the *Northridge*
 13 *Financial* court rejected the argument as "asking this court to extend the jurisdictional time period
 14 of section 473, which is not within our province." *Id.* at 826; *see also Beresh*, 92 Cal. App. 3d at
 15 554-55 (upholding denial of renewed motion on jurisdictional grounds for failure to file within
 16 prescribed time period).

17 Plaintiff's current motion to compel has been filed after the jurisdictional time period for
 18 bringing this motion has elapsed (by more than three months). As in *Northridge Financial*,
 19 Plaintiff's motion cannot be considered to relate back to the previous motion, even if considered
 20 as a renewed motion, because the prescribed 45-day time limit is jurisdictional. Moreover, unlike
 21 *Northridge Financial*, Plaintiff's motion here cannot be considered a renewal of his previous
 22 motion to compel because the two motions are entirely different. (*See supra*, Part III.B.I.a)

23 **2. The Court's Denial of Plaintiff's Motion to Compel Compliance**
 24 **"Without Prejudice" Does Not Extend the 45-day Filing Deadline.**

25 Plaintiff similarly suggests that the Court's denial of his earlier motion to compel
 26 compliance "without prejudice" should be read somehow to extend the 45-day deadline. Plaintiff
 27 cites no authority supporting this contention, because there is none. As mentioned above, the 45-

28 /////

1 day limit is mandatory and jurisdictional. (*See supra*, Part III.B.I) Accordingly, Plaintiff's
2 Motion to Compel Further Responses must be denied.

3 **3. Plaintiff's Collateral Attack on the Court's Previous Order is**
4 **Improper.**

5 Plaintiff even uses his new motion to compel in order to collaterally attack the Court's
6 Order denying Plaintiff's previous motion. This attack on the Court's Order is untimely,
7 improper, and without merit. As in *Northridge Financial*, even if this Court were to entertain
8 Plaintiff's second bite at the apple, the Court is without jurisdiction to grant Plaintiff's motion due
9 to the 45-day prescribed time period for such motions. *Northridge Fin. Corp.*, 48 Cal. App. 3d at
10 826.

11 Additionally, Plaintiff has not brought this motion under California Code of Civil
12 Procedure § 1008, as is required if seeking reconsideration of a court order. Cal. Civ. Proc. Code
13 § 1008(e). Nor can Plaintiff's motion possibly be considered a motion for reconsideration where
14 he has failed to submit the required affidavit and failed to make the required showing for such a
15 motion. Cal. Civ. Proc. Code § 1008(b) ("[I]t shall be shown by affidavit what application was
16 made before, when and to what judge, what order or decisions were made, and what new or
17 different facts, circumstances, or law are claimed to be shown.").

18 Furthermore, Plaintiff's attempts to show error by the Court are misplaced. First, it should
19 be noted that the court took this issue under submission before rendering its Order. It has already
20 analyzed the relevant law and concluded that Plaintiff did not provide the requisite notice for his
21 earlier motion. Additionally, the cases cited by Plaintiff—none of which are new law that has
22 been published since the Court's previous ruling—state only that a court may overlook a defect in
23 the notice of motion where the notice requested the relief sought but simply failed to detail the
24 particular ground for the motion. *Carrasco v. Craft*, 164 Cal. App. 3d 796, 808 (1985); *Geary*
25 *Street, L.P. v. Sup. Ct.*, 219 Cal. App. 3d 1186, 1200 (1990). Further, the court in *Geary* stated
26 that it may overlook a defect in the notice of motion *only* if the accompanying papers and the
27 record support the particular ground for recovery that was overlooked by the notice papers.
28 *Geary Street, L.P. v. Sup. Ct.*, 219 Cal. App. 3d at 1200.

Here, Plaintiff's notice in the earlier motion did not request relief in the form of further responses. As the Court found, Plaintiff's alleged relief sought and ground for recovery was placed in a footnote in his Memorandum of Points and Authorities in Support of his Motion to Compel Compliance, and hence failed to satisfy the notice requirement of notice as set forth by California Civil Procedure Code section 1010 and California Rules of Court Rule 3.1110(a). Plaintiff's scant reference to an alternative motion buried in a footnote within the moving papers does not overcome the defects in Plaintiff's notice of motion and motion. Moreover, no mention of Plaintiff's purported alternative motion was included in the separate statement accompanying his motion. Thus, Plaintiff's attempt to justify the current motion by attacking the Court's earlier Order fails.³

IV. PLAINTIFF'S REQUEST FOR SANCTIONS IS UNWARRANTED.

The Discovery Act provides that monetary sanctions shall be imposed against the losing party and/or attorney on a motion to compel, except where the Court finds the losing party acted with substantial justification. Cal. Civ. Proc. Code §§ 2031.310(d), 2031.320(b). Sanctions against TWC are not proper here because, as explained above, Plaintiff's motion is untimely and substantively without merit. TWC has acted with substantial justification in meeting and conferring with Plaintiff's counsel and in attempting to resolve this discovery dispute. Accordingly, sanctions are not warranted against TWC.⁴ Cal. Civ. Proc. Code § 2023.030(a).

V. SANCTIONS SHOULD BE AWARDED AGAINST PLAINTIFF AND HIS COUNSEL FOR BRINGING THIS FRIVOLOUS MOTION.

Sanctions should, however, be awarded against Plaintiff and his counsel for the costs and fees incurred by TWC in opposing this motion. Plaintiff's motion is clearly untimely and seeks relief that the Court is without jurisdiction to grant. Nonetheless, Plaintiff filed and refused to withdraw this frivolous motion. Plaintiff's tactics in bringing this motion are a misuse of the

³ While Plaintiff's motion is improper and must be denied on jurisdictional grounds, TWC notes that the motion is also substantively without merit for the same reasons set forth in TWC's concurrently filed opposition to Plaintiff's motion to compel regarding TWC's interrogatory responses and TWC's motion for a protective order.

⁴ Moreover, TWC disputes the amount of sanctions requested by Plaintiff, as a large portion of his moving papers appear to be copied and pasted verbatim from his earlier motion to compel compliance and concurrent motion to compel further responses regarding TWC's responses to Plaintiff's interrogatories.

1 discovery process and justify sanctions to compensate TWC for its costs and fees in defending
 2 this motion. Accordingly, TWC requests the Court award sanctions in favor of TWC and against
 3 Plaintiff and his counsel, jointly and severally, in the amount of \$3,208.50. (Declaration of Jillian
 4 L. Proctor ("Proctor Decl.") ¶ 2-3.)⁵

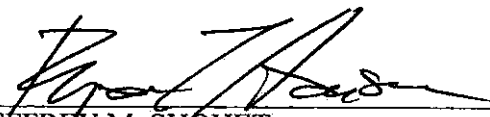
5 **VI. CONCLUSION.**

6 For all the foregoing reasons, TWC respectfully requests that the Court deny Plaintiff's
 7 motion to compel and request for sanctions. TWC further requests that the Court award sanctions
 8 against Plaintiff and his counsel, jointly and severally, in the amount of \$3,208.50 to be paid to
 9 TWC within fifteen days.

10 Dated: March 21, 2008

DLA PIPER US LLP

11
12
13 By


 14 JEFFREY M. SHOHE
 15 JULIE L. HUSSEY
 16 CARRIE S. DOLTON
 17 RYAN T. HANSEN
 18 Attorneys for Defendant
 19 TIME WARNER ENTERTAINMENT-
 20 ADVANCE/NEWHOUSE PARTNERSHIP, A
 21 NEW YORK GENERAL PARTNERSHIP,
 22 THROUGH ITS SAN DIEGO DIVISION,
 23 DBA TIME WARNER CABLE

24
25
26
27 ⁵ "Declaration of Jillian L. Proctor" and "Proctor Decl." refers to the Declaration of Jillian L. Proctor in Opposition to
 28 Plaintiff's Renewed Motion to Compel Further Responses [Re: TWC's Responses to Plaintiff's Requests for
 Production of Documents].

1 JEFFREY M. SHOHET (Bar No. 067529)
2 JULIE L. HUSSEY (Bar No. 237711)
3 CARRIE S. DOLTON (Bar No. 234298)
4 RYAN T. HANSEN (Bar No. 234329)
5 **DLA PIPER US LLP**
6 401 B Street, Suite 1700
7 San Diego, CA 92101-4297
8 Tel: 619.699.2700
9 Fax: 619.699.2701

10 Attorneys for Defendant
11 TIME WARNER ENTERTAINMENT-ADVANCE/
12 NEWHOUSE PARTNERSHIP, A NEW YORK
13 GENERAL PARTNERSHIP, THROUGH ITS SAN
14 DIEGO DIVISION, DBA TIME WARNER CABLE

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

LEON ALPERT, an individual, on behalf
of himself, on behalf of all those similarly
situated, and on behalf of the general
public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a
Delaware corporation, and DOES 1 TO
100,

Defendants.

CASE NO. GIC881621

**DEFENDANT TIME WARNER CABLE'S
SEPARATE STATEMENT IN
OPPOSITION TO PLAINTIFF'S
RENEWED MOTION TO COMPEL
FURTHER RESPONSES TO REQUEST
FOR PRODUCTION OF DOCUMENTS**

Date: April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Hon. Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

SDN1786517.1

TIME WARNER CABLE'S SEPARATE STATEMENT IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO
COMPEL FURTHER RESPONSES TO REQUEST FOR PRODUCTION OF DOCUMENTS

EXHIBIT B 87

1 Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a New York
 2 general partnership, through its San Diego Division, dba Time Warner Cable ("TWC"), sued
 3 erroneously as Time Warner Cable, Inc., respectfully submits the following Separate Statement of
 4 Items in Dispute in Opposition to Plaintiff's *Renewed* Motion to Compel Further Responses to
 5 Plaintiff's Request for Production of Documents].

6 **REQUEST NO. ONE:**

7 Please produce all DOCUMENTS which depict pricing for all of YOUR products and
 8 services, including any bundled packages, to RESIDENTS, (RESIDENTS is defined as
 9 "occupants of properties during the time period from March 13, 2003 to March 13, 2007 that
 10 were part of a homeowners' association (HOA) in California with whom YOU had entered into a
 11 "Residential Bulk Services Agreement" to provide basic cable series to the HOA members.").

12 **RESPONSE TO REQUEST NO. ONE:**

13 TWC objects to this Request as vague, ambiguous, overbroad, unduly burdensome and
 14 oppressive, and is not reasonably calculated to lead to the discovery of admissible information.
 15 The phrase "depict pricing" vaguely requests every document that refers to pricing. TWC objects
 16 to the extent that this request seeks confidential trade secret information regarding negotiated
 17 prices for bulk rate customers. Subject to, and without waiving the General and Specific
 18 objections herein, and based on discovery and TWC's investigation to date, TWC further
 19 responds as follows: TWC has performed a good faith effort to supply documents that identify a
 20 price for TWC products and services, and TWC will produce rate cards and rate change letters.

21 **PLAINTIFF'S BASIS FOR COMPELLING RESPONSE TO REQUEST NO. ONE:**

22 TWC's response unambiguously indicates that TWC was acting in "good faith" to supply
 23 documents" that "identify a price for TWC products and services." The response then states that
 24 TWC will produce rate cards and rate change letters. But that is not all TWC has, as plaintiff
 25 learned in the meet and confer process and as is this Court is now well aware. Rather, TWC is
 26 intentionally withholding pricing documents that reflect pricing for consumers outside of the San
 27 Diego and Desert Cities areas. Thus, either TWC's response is intentionally misleading or it is
 28 intentionally incomplete.

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Moreover, the answering party is not, apparently, even the defendant in this case. The defendant is "Time Warner Cable, Inc., a Delaware Corporation," whereas the responses state they are from TWC "through its San Diego Division, dba Time Warner Cable *and no other person or entity.*" (Emphasis added; Exhibit C, p.3:20-22") That entity is not a party to this litigation and is not named in the FAC. Thus, all of the responses are defective as they relate to an entity that is not the defendant in this case.

Code of Civil Procedure section 2031.210 requires that a party to whom an inspection demand has been directed respond with either a statement that the party will comply with the particular demand for inspection and any related activities, a representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item, or an objection to the particular demand. Here, TWC indicated that it conducted a "good faith" effort to identify responsive documents and then enumerates the responsive documents as "rate cards" and "rate change letters." That is a representation that TWC will comply with the request for production. There is no statement contained therein that TWC is withholding responsive documents or even that such, documents exist. TWC has since admitted that, despite this concealment, it is, in fact, withholding responsive pricing documents for areas outside of the San Diego and Desert Cities areas.

To the extent TWC is somehow hiding behind its objections, Code of Civil Procedure section 2031.240 provides that if the responding party objects to the demand for inspection of an item or category of item, the response shall do both of the following: (1) Identify with particularity any document, tangible thing, or land falling within any category of item in the demand to which an objection is being made. (2) Set forth clearly the extent of and the specific ground for, the objection . . . In its deceptive response, TWC failed to "identify with particularity any document . . . falling within any category of item in the demand to which an objection is being made," TWC states only that rate cards and rate change letters are responsive when TWC knows that is false.

The documents sought are relevant and necessary to establish the essential element of commonality among class members that HOA pricing and so-called "retail" pricing differed

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1 during the class period. That is the core allegation of plaintiff's action. The documents are thus
2 relevant and necessary.

3 While refusing to produce these documents, TWC has moved for summary judgment.
4 Plaintiff cannot adequately oppose TWC's motion any more than plaintiff could go to trial
5 without these relevant documents. Though it is not essential to demonstrate "good cause," here
6 there is no practical or realistic alternative source for the information sought. *Associated Brewers*
7 *Dist Co. v. Superior Court* (1967) 65 Cal.2d 583, 588. The information contained in those
8 documents is highly relevant to these proceedings and most certainly contains information that is
9 either admissible against TWC in opposition to its MSJ, or certainly would lead to the discovery
10 of such information.

11 Code of Civil Procedure section 2017.010 provides that "any party may obtain discovery
12 regarding any matter, not privileged, that is relevant to the subject matter involved in the pending
13 action or to the determination of any motion made in that action, if the matter either is itself
14 admissible in evidence or appears reasonably calculated to lead to the discovery of admissible
15 evidence." "The scope of discovery is very broad." *Tien v. Superior Court* (2006) 139
16 Cal.App.4th 528, 535. The "expansive scope of discovery" (*Emerson Electric Co. v. Superior*
17 *Court* (1997) 16 Cal.4th 1101, 1108) is a deliberate attempt to "take the 'game' element out of
18 trial preparation" and to "do away 'with the sporting theory of litigation — namely, surprise at the
19 trial.'" *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.

20 This is B&P section 17200 case. As our Supreme Court has made plain, in proving an
21 unfair business practice violation, claimants are entitled to introduce evidence not only of
22 practices which affect them individually, but also similar practices involving other members of
23 the public who are not parties to the action. *Perdue v. Crocker National Bank* (1985) 38 Cal.3d
24 913, 929. TWC's attempt to limit discovery in this case is thus contrary to the "broad" scope of
25 discovery permitted under Code of Civil Procedure section 2017.010 and is contrary to the
26 expansive scope of discovery in both class actions and B&P section 17200 claims in particular.

27 /////

28 /////

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REASONS WHY NO FURTHER RESPONSE IS REQUIRED:

This motion to compel was brought far outside the required time limit in which to bring a motion to compel. Thus, as a matter of law, Plaintiff's motion must be denied and no further responses are required. Whereas motions to compel must be filed within the mandatory and jurisdictional deadline of 45 days from the date of the discovery response, Plaintiff filed this motion 139 days after TWC provided the discovery response at issue. The law is clear that Plaintiff's motion is untimely and must be denied.

Section 2031.310(c) states that "[u]nless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, *the demanding party waives any right to compel a further response to the inspection demand.*" Cal. Civ. Proc. Code § 2031.310(c)(emphasis added). The 45-day time limit runs from the date the response is served rather than the date set for production. *Standon Co., Inc. v. Sup. Ct. (Kim)*, 225 Cal. App. 3d 898, 908 (1990). Additionally, the time limit is "mandatory and jurisdictional," and thus the court does not have authority to grant a late motion. *Sexton v. Sup. Ct. (Mullikin Med. Ctr.)*, 58 Cal. App. 4th 1403, 1410 (1997) (holding that the 45-day time limit is jurisdictional and "render the court without authority to rule on motions to compel other than to deny them"); *Prof'l Career Colleges, Magna Institute, Inc. v. Superior Court*, 207 Cal. App. 3d 490, 492-93 (1989) (holding the 45-day time limit is mandatory and jurisdictional).

Plaintiff propounded his Requests for Production of Document, Set One, on or about September 17, 2007. (Declaration of Julie L. Hussey¹ ("Hussey Decl."), ¶ 2, Ex. A.) TWC responded to Plaintiff's requests on or about October 23, 2007. (Hussey Decl. ¶ 3, Ex. B.) On or about December 1, 2007, Plaintiff moved to compel compliance with TWC's responses. The court heard Plaintiff's motion to compel compliance on February 22, 2008, took it under submission, and issued its Order denying the motion on March 13, 2008 (the "Order"). Plaintiff now brings this motion, styled as a motion to "renew" his earlier motion, by filing a *different*

¹ "Declaration of Julie L. Hussey" and "Hussey Decl." refers to the Declaration of Julie L. Hussey in Opposition to Plaintiff's Motion to Further Responses [Re: TWC's Responses to Plaintiff's Requests for Production of Documents].
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1 motion to compel *further responses* to his September 17, 2007 document requests. Plaintiff filed
 2 the pending motion to compel further responses on March 10, 2008—139 days after TWC served
 3 its responses to Plaintiff's requests for production. Thus, Plaintiff's motion is clearly untimely
 4 and cannot be granted as a matter of law.

5 Plaintiff makes several desperate attempts in his moving papers to bypass the 45-day time
 6 limit and justify his tardy motion. First, Plaintiff characterizes his new motion as a "renewed"
 7 motion relating back to his previous motion to compel compliance. Plaintiff fails to explain how
 8 his new motion (seeking further responses) can be considered a renewal of the previous motion
 9 which was entirely different (seeking compliance with responses). As the Court pointed out in its
 10 Order denying Plaintiff's previous motion, the previous motion was a "Motion to Compel
 11 Compliance" brought under section 2031.320(a)—not a "Motion to Compel Further Responses"
 12 under section 2031.310. In response to Plaintiff's attempts to characterize that motion as a
 13 motion to compel further responses rather than a motion to compel compliance, the Court
 14 explained that it "cannot grant different relief, or relief on different grounds, than stated in the
 15 notice of motion," and thus "Plaintiff's motion fails as a Motion to Compel Compliance." (Order,
 16 p. 1.) Plaintiff did not previously bring a motion to compel further responses. Accordingly,
 17 Plaintiff cannot now "renew" a motion that he never brought in the first place.

18 Moreover, renewed motions are not exempt from the time limits established for such
 19 motions. Plaintiff cannot confer jurisdiction on this Court to grant an untimely motion by
 20 claiming some sort of "relation back" doctrine—for which he cites no authority. In fact, in
 21 similar circumstances, courts have found that motions filed after a jurisdictional time limit has
 22 expired do not relate back to previously filed motions. *Beresh v. Sovereign Life Ins. Co. of Cal.*,
 23 92 Cal. App. 3d 547, 551-555 (1979); *Northridge Financial Corp. v. Hamblin*, 48 Cal. App. 3d
 24 819, 824-826 (1975).

25 In *Northridge Financial*, for example, defendants filed a motion under section 473 for
 26 relief from a default judgment six days prior to the six-month jurisdictional time limit for such a
 27 motion. *Northridge Financial Corp.*, 48 Cal. App. 3d at 821-822. The trial court denied
 28 defendants' motion, and defendants promptly filed a "motion for reconsideration," which by then

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-5-

1 was twenty-four days after the six month time limit for a motion under section 473. *Id.* at 822.
2 The trial court denied defendants' second motion on the grounds that it lacked jurisdiction to
3 grant the motion because it was filed after the six-month time limit. *Id.*

4 On appeal, *Northridge Financial* affirmed the trial court's denial of defendants' second
5 motion on jurisdictional grounds. Noting that there was no authority for a "motion for
6 reconsideration" the court considered the second motion as a renewal of defendants' previous
7 motion. *Id.* at 825. Because the "renewed" motion was filed after the six-month time limit for
8 bringing a motion under section 473, the court held the motion was properly denied on
9 jurisdictional grounds. *Id.* at 825-826 ("Since the second motion for relief was made after the
10 prescribed period had expired, the court was without jurisdiction to act."). Although plaintiff
11 argued that the trial court's ruling on the first motion came after the six-month time limit and,
12 thus, precluded him from filing a "renewed" motion within the six-month period, the *Northridge*
13 *Financial* court rejected the argument as "asking this court to extend the jurisdictional time period
14 of section 473, which is not within our province." *Id.* at 826; *see also Beresh*, 92 Cal. App. 3d at
15 554-555 (upholding denial of renewed motion on jurisdictional grounds for failure to file within
16 prescribed time period).

17 Plaintiff's current motion to compel has been filed after the jurisdictional time period for
18 bringing this motion has elapsed (by more than three months). As in *Northridge Financial*,
19 Plaintiff's motion cannot be considered to relate back to the previous motion, even if considered
20 as a renewed motion, because the prescribed 45-day time limit is jurisdictional. Moreover, unlike
21 *Northridge Financial*, Plaintiff's motion here cannot be considered a renewal of his previous
22 motion to compel because the two motions are entirely different.

23 Plaintiff similarly suggests that the Court's denial of his earlier motion to compel
24 compliance "without prejudice" should be read somehow to extend the 45-day deadline. Plaintiff
25 cites no authority supporting this contention, because there is none. As mentioned above, the 45-
26 day limit is mandatory and jurisdictional.

27 Plaintiff even goes so far as to use his moving papers to collaterally attack the Court's
28 ruling on his previous motion to compel. Plaintiff's attempt at showing error on the part of the
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1 Court and implicitly requesting reconsideration is improper and misplaced. Due to the
 2 jurisdictional time line, Plaintiff's motion addressing the discovery requests at issue is untimely
 3 regardless of how it is styled. As in *Northridge Financial*, even if this Court were to entertain
 4 Plaintiff's second bite at the apple, the Court is without jurisdiction to grant Plaintiff's motion due
 5 to the 45-day prescribed time period for such motions. *Northridge Fin. Corp.*, 48 Cal. App. 3d at
 6 826.²

7 Furthermore, the Court did not err in its previous ruling denying Plaintiff's motion to
 8 compel. As a preliminary matter, it should be noted that the court took this issue under
 9 submission before rendering its Order. It has already analyzed the relevant law and concluded
 10 that Plaintiff did not provide the requisite notice for his earlier motion. Additionally, the cases
 11 cited by Plaintiff—none of which are new law that has been published since the Court's previous
 12 ruling—state only that a court may overlook a defect in the notice of motion where the notice
 13 requested the relief sought but simply failed to detail the particular ground for the motion.
 14 *Carrasco v. Craft*, 164 Cal. App. 3d 796, 808 (1985); *Geary Street, L.P. v. Superior Court*, 219
 15 Cal. App. 3d 1186, 1200 (1990). Further, the court in *Geary* stated that it may overlook a defect
 16 in the notice of motion *only* if the accompanying papers and the record support the particular
 17 ground for recovery that was overlooked by the notice papers. *Geary Street, L.P. v. Superior*
 18 *Court*, 219 Cal. App. 3d at 1200.

19 Here, Plaintiff's notice in the earlier motion did not request relief in the form of further
 20 responses. As the Court found, Plaintiff's alleged relief sought and ground for recovery was
 21 placed in a footnote in his Memorandum of Points and Authorities in Support of his Motion to
 22 Compel Compliance, and hence failed to satisfy the notice requirement of notice as set forth by
 23 CCP § 1010 and California Rules of Court Rule 3.1110(a). Plaintiff's scant reference to an
 24 alternative motion buried in a footnote within the moving papers does not overcome the defects in

25 ² Additionally, Plaintiff has not brought this motion under California Code of Civil Procedure § 1008, as is required
 26 if seeking reconsideration of a court order. Cal. Civ. Proc. Code § 1008(e). Nor can Plaintiff's motion possibly be
 27 considered a motion for reconsideration where he has failed to submit the required affidavit and failed to make the
 28 required showing for such a motion. Cal. Civ. Proc. Code § 1008(b) ("[I]t shall be shown by affidavit what
 application was made before, when and to what judge, what order or decisions were made, and what new or different
 facts, circumstances, or law are claimed to be shown.").

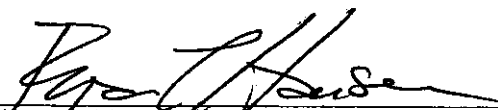
1 Plaintiff's notice of motion and motion. Moreover, no mention of Plaintiff's purported alternative
 2 motion was included in the separate statement accompanying his motion. Thus, Plaintiff's
 3 attempt to justify the current motion by attacking the Court's earlier Order fails.

4 Finally, with respect to Plaintiff's argument that "Time Warner Cable, Inc., a Delaware
 5 Corporation" is the defendant in this case and should have answered the discovery requests
 6 instead of TWC, it should be noted that TWC pointed out at the commencement of this litigation
 7 that Plaintiff's naming of Time Warner Cable, Inc. was in error. Time Warner Cable, Inc. is not
 8 the entity that owns and operates the cable business in San Diego. Rather than demurrer to
 9 Plaintiff's pleadings due to his error in identifying the correct corporate entity, TWC answered
 10 Plaintiff's amended complaint with the explanation that it had been "erroneously sued as Time
 11 Warner Cable, Inc." Plaintiff made no objection, nor has Plaintiff at anytime in this litigation
 12 objected to TWC's involvement in this litigation as the defendant erroneously sued as "Time
 13 Warner Cable, Inc." If Plaintiff wishes to proceed against Time Warner Cable, Inc. and not
 14 TWC, TWC requests a dismissal with prejudice from this lawsuit. Furthermore, Plaintiff's
 15 motion should be denied, as Time Warner Cable, Inc. has not been served with Plaintiff's
 16 operative complaint, nor has it entered an appearance in this case.

17 Dated: March 21, 2008

DLA PIPER US LLP

19 By


 20 JEFFREY M. SHOHE
 21 JULIE L. HUSSEY
 22 CARRIE S. DOLTON
 23 RYAN T. HANSEN
 24 Attorneys for Defendant
 25 TIME WARNER ENTERTAINMENT-
 26 ADVANCE/NEWHOUSE PARTNERSHIP, A
 27 NEW YORK GENERAL PARTNERSHIP,
 28 THROUGH ITS SAN DIEGO DIVISION,
 DBA TIME WARNER CABLE

JEFFREY M. SHOHE (Bar No. 067529)
JULIE L. HUSSEY (Bar No. 237711)
CARRIE S. DOLTON (Bar No. 234298)
DLA PIPER US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

SAN DIEGO COUNTY COURT
MAR 21 2008
CLERK OF THE COURT
BY _____

Attorneys for Defendant
TIME WARNER ENTERTAINMENT-ADVANCE/
NEWHOUSE PARTNERSHIP, A NEW YORK
GENERAL PARTNERSHIP, THROUGH ITS SAN
DIEGO DIVISION, DBA TIME WARNER CABLE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

LEON ALPERT, an individual, on behalf
of himself, on behalf of all those similarly
situated, and on behalf of the general
public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a
Delaware corporation, and DOES 1 TO
100,

Defendants.

CASE NO. GIC881621

**DECLARATION OF JULIE L. HUSSEY IN
OPPOSITION TO PLAINTIFF'S
RENEWED MOTION TO COMPEL
FURTHER RESPONSES [RE: TIME
WARNER CABLE'S RESPONSES TO
PLAINTIFF'S REQUESTS FOR
PRODUCTION OF DOCUMENTS]**

Date: April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

1 I, Julie L. Hussey, declare and state as follows:

2 1. I am an attorney duly admitted to practice law in the State of California, and
3 admitted to appear before this Court. I am a partner with the law firm of DLA Piper US LLP,
4 attorneys of record for Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a
5 New York general partnership, through its San Diego Division, dba Time Warner Cable ("TWC")
6 in the above-captioned action. I have personal knowledge of the facts set forth herein and, if
7 called to testify, I could and would testify competently thereto.

8 2. Attached hereto as Exhibit A is a true and correct copy of Plaintiff's Requests for
9 Production of Documents, Set One, that were served on TWC on or about September 17, 2007.

10 3. Attached hereto as Exhibit B is a true and correct copy of TWC's responses to
11 Plaintiff's Requests for Production of Document, Set One, served on Plaintiff on or about October
12 23, 2007.

13 I declare under penalty of perjury under the laws of the State of California and the United
14 States of America that the foregoing is true and correct and that this declaration was executed on
15 March 20, 2008, in San Diego, California.

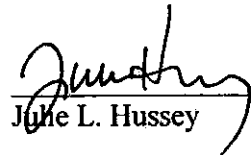
16
17 
18 Julie L. Hussey
19
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23
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27
28

EXHIBIT A

EXHIBIT B 98

1 **BARRON E. RAMOS**
 2 Attorney at Law, A Professional Corporation
 3 Barron E. Ramos (State Bar No. 179620)
 4 132 N. El Camino Real, # 303
 5 Encinitas, California 92024
 6 Phone (858) 349-6019
 7 Fax (760) 994-1354

8 **CLARK & MARKHAM**
 9 David R. Markham (State Bar No. 071814)
 10 R. Craig Clark (State Bar No. 129219)
 11 James M. Treglio (State Bar No. 228077)
 12 401 West "A" Street, Suite 2200
 13 San Diego, CA 92101
 14 Telephone: (619) 239-1321
 15 Facsimile: (619) 239-5888

16 Attorneys for plaintiff and the Class

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **COUNTY OF SAN DIEGO**

19 **LEON ALPERT**, an individual,) Case No. GIC 881621
 20 on behalf of himself, on behalf of all those)
 21 similarly situated, and on behalf of the general) **CLASS ACTION**
 22 public,)

23 Plaintiffs,
 24 v.

25 **PLAINTIFF'S REQUEST FOR**
 26 **PRODUCTION OF DOCUMENTS,**
 27 **SET NO. ONE (1)**

28 **TIME WARNER CABLE, INC.**, a Delaware)
 corporation, and DOES 1 TO 100,)

Dept: 63
 Judge: Hon. Luis R. Vargas

Defendants.

Trial Date: None Set
 Case Filed: March 13, 2007

PROPOUNDING PARTY:

PLAINTIFF LEON ALPERT

RESPONDING PARTY:

TIME WARNER CABLE, INC.

NO:

ONE

1 **PLEASE TAKE NOTICE** that on or before October 25, at 10:00 a.m. in the Law Offices
2 of BARRON E. RAMOS, Attorney at Law, A Professional Corporation, 132 N. El Camino Real,
3 # 303, Encinitas, California 92024, plaintiff Chadwick Bowen will require defendant TIME
4 WARNER CABLE, INC., to produce for inspection and copying the following pursuant to
5 California Code of Civil Procedure Section 2031.010 to wit:

6 **Definitions:**

7 A. The term "DOCUMENT" or "DOCUMENTS" shall include any "writing" as
8 defined in California Evidence Code section 250, whether printed, recorded, filmed or reproduced
9 by any other mechanical or electrical process, or written or produced by hand, and whether or not
10 claimed to be privileged against discovery on any ground, and including all originals, masters, and
11 non-identical copies.

12 B. The term "YOU" or "YOUR" shall refer to TIME WARNER CABLE, INC., all
13 affiliated entities of TIME WARNER CABLE, INC., including its parent company, if any, and all
14 subsidiaries of such parent, the employees, agents, officers, directors and representatives of all of
15 these entities, and all other persons or entities acting on behalf or under the control of these entities.

16 C. The term RESIDENT shall refer to occupants of properties during the time period
17 from March 13, 2003 to March 13, 2007 that were part of a homeowners' association (HOA) in
18 California with whom YOU had entered into a "Residential Bulk Services Agreement" to provide
19 basic cable services to the HOA members.

20 D. The term RETAIL CUSTOMER shall refer to California consumers to whom YOU
21 provided products and services during the time period from March 13, 2003 to March 13, 2007,
22 other than RESIDENTS.

23 **REQUEST NUMBER ONE:**

24 Please produce all DOCUMENTS which depict pricing for all of YOUR products and
25 services, including any bundled service packages, to RESIDENTS.

26 **REQUEST NUMBER TWO:**

27 Please produce all DOCUMENTS which depict pricing for all of YOUR products and
28

1 services, including any bundled service packages, to RETAIL CUSTOMERS.

2 **REQUEST NUMBER THREE:**

3 Please produce all DOCUMENTS which depict all communications with plaintiff Leon
4 Alpert at any time, including, but not limited to, transcripts of telephone conversations,
5 correspondence to and from Mr. Alpert, e-mail communications to and from Mr. Alpert, and any
6 other form in which YOU maintain such communications (e.g., audio recordings).

7 **REQUEST NUMBER FOUR:**

8 Please produce a copy of any scripts used by YOUR employees when dealing with
9 RESIDENTS that call to complain about their bill.

10 **REQUEST NUMBER FIVE:**

11 Please produce a copy of any scripts used by YOUR employees when dealing with
12 RETAIL CUSTOMERS that call to complaint about their bill.

13 **REQUEST NUMBER SIX:**

14 Please produce a copy of all web pages YOU posted during the time period from March 13,
15 2003 to March 13, 2007 which depict pricing for all of YOUR products and services, including any
16 bundled service packages, to RESIDENTS.

17 **REQUEST NUMBER SEVEN:**

18 Please produce a copy of all web pages YOU posted during the time period from March 13,
19 2003 to March 13, 2007 which depict pricing for all of YOUR products and services, including any
20 bundled service packages, to RETAIL CUSTOMERS.

21 **REQUEST NUMBER EIGHT:**

22 Please produce a copy of all DOCUMENTS which explain why RESIDENTS and RETAIL
23 CUSTOMERS are charged differing rates for YOUR products and services.

24 **REQUEST NUMBER NINE:**

25 Please produce a copy of all DOCUMENTS which demonstrate how YOUR employees that
26 handle incoming customer calls determine whether the customer that is calling is a RESIDENT or
27 a RETAIL CUSTOMER.

REQUEST NUMBER TEN:

Please produce a copy of all DOCUMENTS which demonstrate how YOUR employees determine whether to charge a customer purchasing products or services as a RESIDENT customer or a RETAIL CUSTOMER.

REQUEST NUMBER ELEVEN:

Please produce a copy of YOUR policies and procedures when dealing with RESIDENTS that request a refund for being overcharged for products and services provided by YOU.

REQUEST NUMBER TWELVE:

Please produce a copy of YOUR policies and procedures when dealing with RETAIL CUSTOMERS that request a refund for being overcharged for products and services provided by YOU.

DATED: September 17, 2007

By: 

Barron E. Ramos

Attorneys for Plaintiff and the Class

PROOF OF SERVICE

I am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 132 N. El Camino Real, # 303, Encinitas, California 92024.

On September 17, 2007, I served the following documents:

REQUEST FOR PRODUCTION OF DOCUMENTS, SET NO. ONE

on the parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

Jeffrey M. Shohet
Julie L. Hussey
Carrie S. Dolton
DLA PIPER US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Facsimile: (619) 699-2701

*Attorneys for Time Warner Entertainment-
Advance NewHouse Partnership, A New York
General Partnership, Through its San Diego
Division d.b.a. Time Warner Cable*

X (BY MAIL) I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at 132 N. El Camino Real, # 303, Encinitas, California 92024, following ordinary business practices. I am familiar with the practice of collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal service the same day as it is placed for collection.

(BY FACSIMILE) I transmitted the above-listed document to the party listed above via facsimile. The transmission was reported complete and without error. The telephone number of the facsimile machine I used was (858) 720-0752.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Encinitas, California on September 17, 2007.


Barron E. Ramos

EXHIBIT B

JEFFREY M. SHOHET (Bar No. 067529)
 JULIE L. HUSSEY (Bar No. 237711)
 CARRIE S. DOLTON (Bar No. 234298)
DLA PIPER US LLP
 401 B Street, Suite 1700
 San Diego, CA 92101-4297
 Tel: 619.699.2700
 Fax: 619.699.2701

Attorneys for Defendant
 TIME WARNER ENTERTAINMENT-ADVANCE/
 NEWHOUSE PARTNERSHIP, A NEW YORK
 GENERAL PARTNERSHIP, THROUGH ITS SAN
 DIEGO DIVISION, DBA TIME WARNER CABLE

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

LEON ALPERT, an individual, on behalf
 of himself, on behalf of all those similarly
 situated, and on behalf of the general
 public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a
 Delaware corporation, and DOES 1 TO
 100,

Defendants.

CASE NO. GIC881621

**DEFENDANT TIME WARNER
 ENTERTAINMENT-ADVANCE/
 NEWHOUSE PARTNERSHIP, THROUGH
 ITS SAN DIEGO DIVISION, DBA TIME
 WARNER CABLE'S RESPONSES TO
 PLAINTIFF'S REQUEST FOR
 PRODUCTION OF DOCUMENTS, SET
 NO. ONE (1)**

Dept: 63
 Judge: Luis R. Vargas

Complaint: March 13, 2007
 FAC: May 16, 2007

PROPOUNDING PARTY: Plaintiff LEON ALPERT

RESPONDING PARTY: Defendant TIME WARNER CABLE

SET NO: ONE

Pursuant to Code of Civil Procedure section 2031.010, *et seq.*, Defendant Time Warner
 Entertainment-Advance/Newhouse Partnership, a New York general partnership, through its San
 Diego Division, dba Time Warner Cable ("TWC"), sued erroneously as Time Warner Cable, Inc.,

-1-

DLA PIPER US LLP
 SAN DIEGO

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DEFENDANT TWC'S RESPONSES TO PLAINTIFF'S REQUEST
 FOR PRODUCTION OF DOCUMENTS, SET ONE

1 responds to plaintiff Leon Alpert's ("Plaintiff") first set of request for production of documents
2 ("Requests") as follows:

3 **PRELIMINARY STATEMENT AND GENERAL OBJECTIONS**

4 TWC has not completed investigation of this case, has not completed discovery, and has
5 not completed preparation for trial. All of the responses contained herein are based only on such
6 information that is presently available to and specifically known to TWC. It is anticipated that
7 further discovery, independent investigation, legal research and analysis will supply additional
8 facts, add additional meaning to the known facts, as well as establish entirely new factual
9 conclusions and legal contentions, all of which may lead to substantial additions to, changes in,
10 and variations from the responses herein set forth.

11 The following written responses are given without prejudice to TWC's right to produce
12 evidence of any subsequently discovered fact or facts that TWC may later develop. The
13 responses contained herein are made in a good faith effort to supply as much factual information
14 as is presently known, but should in no way lead to the prejudice of TWC in relation to further
15 discovery, research or analysis. TWC will produce responsive documents reflective of the time
16 period identified in Plaintiff's Requests, including March 13, 2003 until March 13, 2007.

17 In providing responses to the demands, TWC does not in any manner waive or intend to
18 waive, but rather intends to preserve and is preserving:

19 (1) All objections as to competency, relevancy, materiality and admissibility of the
20 requested documents or the subject matter thereof;

21 (2) All rights to object to the use of any documents produced, or the subject matter
22 thereof, in any subsequent proceedings; and

23 (3) All rights to object on any ground to any request for further responses to these or any
24 other demands for documents or other discovery demands involving or related to the subject
25 matter of the demands.

26 ////

27 ////

28 ////

-2-

1 **A. General Objections.**

2 TWC objects to the demands to the extent they seek discovery of matters that constitute or
3 reflect work product of attorneys, material prepared in anticipation of litigation, attorney-client
4 communications or are protected by privileges provided for under applicable state or federal law.

5 TWC also objects to this request to the extent that it seeks TWC's trade secret or
6 confidential and/or commercially sensitive business information without a protective order in
7 place.

8 TWC further objects to the location of the production and will produce documents in a
9 mutually agreeable manner, time and place.

10 TWC incorporates by reference each and every general objection set forth above into each
11 and every specific response. By responding that documents will be produced, TWC does not
12 represent that such documents exist; rather, only that a reasonable good faith search for such
13 documents will be made and, to the extent that such documents do exist, those documents will be
14 produced subject to the objections stated.

15 **B. Objections to Plaintiff's Defined Terms.**

16 TWC objects to Plaintiff's purported definition of the terms "YOU," and "YOUR" to the
17 extent that it renders each request including these terms to be vague and ambiguous, as well as
18 overly broad. The definition is so overbroad that it appears to call for information from literally
19 hundreds of different corporate entities and their privileged communications with their counsel.
20 TWC shall construe the terms "YOU," and "YOUR," when used in the Requests, to mean Time
21 Warner Entertainment-Advance/Newhouse Partnership, a New York general partnership, through
22 its San Diego Division, dba Time Warner Cable and no other person or entity.

23 TWC objects to Plaintiff's definition of the term "RESIDENT" to the extent that it renders
24 each request including this term to be vague and ambiguous, as well as overly broad.

25 TWC objects to Plaintiff's definition of the term "RETAIL CUSTOMER" to the extent
26 that it renders each request including this term to be vague and ambiguous, as well as overly
27 broad. Among other things, Plaintiff's definition is further flawed by the inclusion of the term
28 "consumers." TWC provides products and services to millions of individuals, residential

-3-

properties, and business entities across the United States. Plaintiff has only brought a claim purportedly on behalf of himself and on behalf of all California TWC subscribers: (1) who were members of HOAs and/or tenants of such members; (2) where the subscriber's HOA had contracted with TWC for basic cable services; and (3) where the subscriber purchased additional cable and cable related services directly from TWC but allegedly was not provided a credit for the basic cable services provided through the subscriber's HOA. Therefore, the inclusion of "consumers" in the definition renders each request which includes the defined term "RETAIL CUSTOMER" overbroad, beyond the scope of permissible discovery, unduly burdensome and harassing. TWC shall construe the term "RETAIL CUSTOMER" when used in the Requests, to mean TWC San Diego division subscribers of TWC products and services, other than bulk subscribers or business subscribers.

These preliminary objections are hereby incorporated into each and every objection to the Requests set forth below. Subject to the limitations and objections set forth above, TWC responds to the Requests as follows:

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Please produce all DOCUMENTS which depict pricing for all of YOUR products and services, including any bundled service packages, to RESIDENTS.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

TWC objects to this Request as vague, ambiguous, overbroad, unduly burdensome and oppressive, and is not reasonably calculated to lead to the discovery of admissible information. The phrase "depict pricing" vaguely requests *every* document that refers to pricing. TWC objects to the extent that this request seeks confidential trade secret information regarding negotiated prices for bulk rate customers. Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC has performed a good faith effort to supply documents that identify a price for TWC products and services, and TWC will produce rate cards and rate change letters.

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-4-

REQUEST FOR PRODUCTION No. 2:

Please produce all DOCUMENTS which depict pricing for all of YOUR products and services, including any bundled service packages, to RETAIL CUSTOMERS.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

TWC objects to this Request as vague, ambiguous, overbroad, unduly burdensome and oppressive, and is not reasonably calculated to lead to the discovery of admissible information. The phrase "depict pricing" vaguely requests *every* document that refer to pricing. TWC objects to the extent that this request seeks confidential trade secret information regarding negotiated prices for bulk rate customers. Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC has performed a good faith effort to supply documents that identify a price for TWC products and services, and TWC will produce rate cards, rate estimates, rate letters and bill notification messages.

REQUEST FOR PRODUCTION NO. 3:

Please produce all DOCUMENTS which depict all communications with plaintiff Leon Alpert at any time, including, but not limited to, transcripts of telephone conversations, correspondence to and from Mr. Alpert, e-mail communications to and from Mr. Alpert, and any other form in which YOU maintain such communications (e.g., audio recordings).

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC will produce all non-privileged documents in its possession, custody or control which it can located and identify as responsive to this request.

REQUEST FOR PRODUCTION NO. 4:

Please produce a copy of any scripts used by YOUR employees when dealing with RESIDENTS that call to complain about their bill.

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-5-

1 RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

2 Subject to, and without waiving the General and Specific Objections herein, and based on
 3 discovery and TWC's investigation to date, TWC further responds as follows: TWC has
 4 performed a good faith effort to supply responsive documents to Plaintiff's requests for
 5 production of documents and has not yet identified any documents in its possession, custody or
 6 control which it can identify as being responsive to this request.

7 REQUEST FOR PRODUCTION NO. 5:

8 Please produce a copy of any scripts used by YOUR employees when dealing with
 9 RETAIL CUSTOMERS that call to complaint about their bill.

10 RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

11 Subject to, and without waiving the General and Specific Objections herein, and based on
 12 discovery and TWC's investigation to date, TWC further responds as follows: TWC has
 13 performed a good faith effort to supply responsive documents to Plaintiff's requests for
 14 production of documents and has not yet identified any documents in its possession, custody or
 15 control which it can identify as being responsive to this request.

16 REQUEST FOR PRODUCTION NO. 6:

17 Please produce a copy of all web pages YOU posted during the time period from
 18 March 13, 2003 to March 13, 2007 which depict pricing for all of YOUR products and services,
 19 including any bundled service packages, to RESIDENTS.

20 RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

21 TWC objects to this request as overbroad, unduly burdensome , and not reasonably
 22 calculated to lead to the discovery of admissible evidence. TWC does not archive its web pages
 23 and overwrites them with updated web pages at the time of update. Subject to, and without
 24 waiving the General and Specific Objections herein, and based on discovery and TWC's
 25 investigation to date, TWC further responds as follows: TWC has performed a good faith effort
 26 to supply responsive documents to Plaintiff's requests for production of documents and has not
 27 yet identified any documents in its possession, custody or control which it can identify as being
 28 responsive to this request.

-6-

REQUEST FOR PRODUCTION NO. 7:

Please produce a copy of all web pages YOU posted during the time period from March 13, 2003 to March 13, 2007 which depict pricing for all of YOUR products and services, including any bundled service packages, to RETAIL CUSTOMERS.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

TWC objects to this request as overbroad, unduly burdensome , and not reasonably calculated to lead to the discovery of admissible evidence. TWC does not archive its web pages and overwrites them with updated web pages at the time of update. Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC has performed a good faith effort to supply responsive documents to Plaintiff's requests for production of documents and has not yet identified any documents in its possession, custody or control which it can identify as being responsive to this request.

REQUEST FOR PRODUCTION NO. 8:

Please produce a copy of all DOCUMENTS which explain why RESIDENTS and RETAIL CUSTOMERS are charged differing rates for YOUR products and services.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

TWC objects to this request as vague, ambiguous, seeking confidential trade secret information and argumentative. TWC also objects to this request as overly burdensome to produce each HOA agreement. Some RESIDENTS are also charged less than other RESIDENTS and RETAIL CUSTOMERS for basic and additional cable services as specifically negotiated by their HOAs. Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC has performed a good faith effort to supply responsive documents to Plaintiff's requests for production of documents and has not yet identified any documents in its possession, custody or control which it can identify as being responsive to this request.

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-7-

REQUEST FOR PRODUCTION NO. 9:

Please produce a copy of all DOCUMENTS which demonstrate how YOUR employees that handle incoming customer calls determine whether the customer that is calling is a RESIDENT or a RETAIL CUSTOMER.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

TWC objects to this request as overbroad, unduly burdensome, seeking confidential information, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC will produce all non-privileged documents in its possession, custody or control which it can identify as being responsive to this request, including documents that indicate the screen viewed by TWC employees that is used to determine whether the customer is a RESIDENT or a RETAIL customer. Because of consumer confidentiality, only Plaintiff's record indicating such will be produced.

REQUEST FOR PRODUCTION NO. 10:

Please produce a copy of all DOCUMENTS which demonstrate how YOUR employees determine whether to charge a customer purchasing products or services as a RESIDENT customer or a RETAIL CUSTOMER.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

TWC objects to this request as overbroad, unduly burdensome, seeking confidential information, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC will produce all non-privileged documents in its possession, custody or control which it can identify as being responsive to this request, including documents that indicate the screen viewed by TWC employees that is used to determine whether the customer is a RESIDENT or a RETAIL customer. Because of consumer confidentiality, only Plaintiff's record indicating such will be produced.

-8-

REQUEST FOR PRODUCTION NO. 11:

Please produce a copy of YOUR policies and procedures when dealing with RESIDENTS that request a refund for being overcharged for products and services provided by YOU.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC will produce all non-privileged documents in its possession, custody or control which it can identify as being responsive to this request.

REQUEST FOR PRODUCTION NO. 12:

Please produce a copy of YOUR policies and procedures when dealing with RETAIL CUSTOMERS that request a refund for being overcharged for products and services provided by YOU.

RESPONSE TO REQUEST FOR PRODUCTION No. 12:

Subject to, and without waiving the General and Specific Objections herein, and based on discovery and TWC's investigation to date, TWC further responds as follows: TWC will produce all non-privileged documents in its possession, custody or control which it can identify as being responsive to this request, at a mutually convenient date and time.

Dated: October 23, 2007

DLA PIPER US LLP

By 

JEFFREY M. SHOHE
JULIE L. HUSSEY
CARRIE S. DOLTON
Attorneys for Defendant
TIME WARNER ENTERTAINMENT-
ADVANCE/NEWHOUSE PARTNERSHIP, A
NEW YORK GENERAL PARTNERSHIP,
THROUGH ITS SAN DIEGO DIVISION,
DBA TIME WARNER CABLE

-9-

DLA PIPER US LLP
SAN DIEGO

GT\6546327.1
325566-11

DEFENDANT TWC'S RESPONSES TO PLAINTIFF'S REQUEST
FOR PRODUCTION OF DOCUMENTS, SET ONE

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper US LLP, 401 B Street, Suite 1700, San Diego, California 92101. On October 23, 2007, I served the within document(s):

**TIME WARNER ENTERTAINMENT-ADVANCE/ NEWHOUSE PARTNERSHIP, A
NEW YORK GENERAL PARTNERSHIP, THROUGH ITS SAN DIEGO DIVISION,
DBA TIME WARNER CABLE'S NOTICE OF DEPOSITION OF PLAINTIFF LEON
ALPERT**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ by placing a sealed envelope or package designated by UPS, with delivery fees paid or provided for, a true copy of each documents(s) above, in DLA Piper US LLP's mail room for collection, processing and delivery this same day to a deposit box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for delivery with express service carriers (i.e., FedEx, DHL, etc.); and that the correspondence shall be deposited with an express service carrier this same day in the ordinary course of business, to each addressee as set forth below.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Attorneys for Plaintiff

Barron E. Ramos, Esq.
132 N El Camino Real, Ste 303
Encinitas CA 92024
(858) 349-6019
(760) 994-1354 (fax)

David R. Markham, Esq.
Clark & Markham
401 West A St, Ste 2200
San Diego CA 92101
(619) 239-1321
(619) 239-5888 (fax)

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 23, 2007, at San Diego, California.


Eloy Rodriguez

-10-

DLA PIPER US LLP
SAN DIEGO

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325566-11

DEFENDANT TWC'S RESPONSES TO PLAINTIFF'S REQUEST
FOR PRODUCTION OF DOCUMENTS, SET ONE

1 JEFFREY M. SHOHE (Bar No. 067529)
JULIE L. HUSSEY (Bar No. 237711)
2 CARRIE S. DOLTON (Bar No. 234298)
RYAN T. HANSEN (Bar No. 234329)
3 **DLA PIPER US LLP**
401 B Street, Suite 1700
4 San Diego, CA 92101-4297
Tel: 619.699.2700
5 Fax: 619.699.2701

6 Attorneys for Defendant
7 TIME WARNER ENTERTAINMENT-ADVANCE/
NEWHOUSE PARTNERSHIP, A NEW YORK
8 GENERAL PARTNERSHIP, THROUGH ITS SAN
DIEGO DIVISION, DBA TIME WARNER CABLE
9

10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF SAN DIEGO

12
13 LEON ALPERT, an individual, on behalf
of himself, on behalf of all those similarly
14 situated, and on behalf of the general
public,

15 Plaintiffs,

16 v.

17 TIME WARNER CABLE, INC., a
18 Delaware corporation, and DOES 1 TO
100,

19 Defendants.
20
21
22

CASE NO. GIC881621

**DECLARATION OF JILLIAN L.
PROCTOR IN OPPOSITION TO
PLAINTIFF'S RENEWED MOTION TO
COMPEL FURTHER RESPONSES [RE:
TIME WARNER CABLE'S RESPONSES
TO PLAINTIFF'S REQUESTS FOR
PRODUCTION OF DOCUMENTS]**

Date: April 4, 2008
Time: 10:30 a.m.
Dept: 63
Judge: Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

1 I, Jillian L. Proctor, declare and state as follows:

2 1. I am an attorney duly admitted to practice law in the State of California, and
3 admitted to appear before this Court. I am an associate with the law firm of DLA Piper US LLP,
4 attorneys of record for Defendant Time Warner Entertainment-Advance/Newhouse Partnership, a
5 New York general partnership, through its San Diego Division, dba Time Warner Cable ("TWC")
6 in the above-captioned action. I have personal knowledge of the facts set forth herein and, if
7 called to testify, I could and would testify competently thereto.

8 1. I spent 9.3 hours researching and preparing TWC's opposition brief and
9 supporting documents in response to Plaintiff Leon Alpert's Renewed Motion to Compel Further
10 Responses [Re: Time Warner Cable's Responses to Plaintiff's Requests for Production of
11 Documents].

12 2. My standard hourly rate is \$345 per hour. The total amount of my time in
13 opposing this "renewed" motion to compel cost \$3,208.50.

14 I declare under penalty of perjury under the laws of the state of California that the
15 foregoing is true and correct. Executed this 20 day of March 2008 at San Diego, California.

16
17 
18 JILLIAN L. PROCTOR
19
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21
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23
24
25
26
27
28

JEFFREY M. SHOHE (Bar No. 067529)
JULIE L. HUSSEY (Bar No. 237711)
CARRIE S. DOLTON (Bar No. 234298)
DLA PIPER US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

FILED
SAN DIEGO SUPERIOR COURT
MAY 21 2006
CLERK OF THE SUPERIOR COURT
BY

Attorneys for Defendant
TIME WARNER ENTERTAINMENT-ADVANCE/
NEWHOUSE PARTNERSHIP, A NEW YORK
GENERAL PARTNERSHIP, THROUGH ITS SAN
DIEGO DIVISION, DBA TIME WARNER CABLE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

LEON ALPERT, an individual, on behalf
of himself, on behalf of all those similarly
situated, and on behalf of the general
public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a
Delaware corporation, and DOES 1 TO
100,

Defendants.

CASE NO. GIC881621

PROOF OF SERVICE

Dept: 63
Judge: Luis R. Vargas

Complaint: March 13, 2007
FAC: May 16, 2007

1 I am a resident of the State of California, over the age of eighteen years, and not a party to
 2 the within action. My business address is DLA Piper US LLP, 401 B Street, Suite 1700,
 San Diego, California 92101. On March 21, 2008, I served the within document(s):

3 **1. DEFENDANT TIME WARNER CABLE'S MEMORANDUM OF POINTS AND**
 4 **AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL**
FURTHER RESPONSES TO PLAINTIFF'S INTERROGATORIES;

5 **2. DEFENDANT TIME WARNER CABLE'S SEPARATE STATEMENT IN**
 6 **OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL FURTHER RESPONSES**
TO PLAINTIFF'S INTERROGATORIES;

7 **3. DECLARATION OF TERRI RHODES IN SUPPORT OF TWC'S OPPOSITION**
 8 **TO PLAINTIFF'S MOTION TO COMPEL FURTHER RESPONSES TO**
PLAINTIFF'S INTERROGATORIES;

9 **4. DECLARATION OF JULIE L. HUSSEY IN OPPOSITION TO PLAINTIFF'S**
 10 **MOTION TO COMPEL FURTHER RESPONSES TO PLAINTIFF'S**
INTERROGATORIES;

11 **5. DEFENDANT TIME WARNER CABLE'S MEMORANDUM OF POINTS AND**
 12 **AUTHORITIES IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO**
 13 **COMPEL FURTHER RESPONSES [RE: TIME WARNER CABLE'S RESPONSES**
TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS];

14 **6. DEFENDANT TIME WARNER CABLE'S SEPARATE STATEMENT IN**
 15 **OPPOSITION TO PLAINTIFF'S RENEWED MOTION TO COMPEL FURTHER**
RESPONSES TO REQUEST FOR PRODUCTION OF DOCUMENTS;

16 **7. DECLARATION OF JULIE L. HUSSEY IN OPPOSITION TO PLAINTIFF'S**
 17 **RENEWED MOTION TO COMPEL FURTHER RESPONSES [RE: TIME WARNER**
CABLE'S RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF
DOCUMENTS];

18 **8. DECLARATION OF JULLIAN L. PROCTOR IN OPPOSITION TO**
 19 **PLAINTIFF'S RENEWED MOTION TO COMPEL FURTHER RESPONSES [RE:**
TIME WARNER CABLE'S RESPONSES TO PLAINTIFF'S REQUESTS FOR
PRODUCTION OF DOCUMENTS].



21 by overnight mail by placing a sealed envelope or package designated by
 22 FEDERAL EXPRESS, with delivery fees paid or provided for, a true copy of each
 23 documents(s) above, in DLA Piper US LLP's mail room for collection, processing
 24 and delivery this same day to a deposit box or other facility regularly maintained
 25 by the express service carrier, or delivered to an authorized courier or driver
 26 authorized by the express service carrier to receive documents. I further declare
 27 that I am readily familiar with the business' practice for collection and processing
 28 of correspondence for delivery with express service carriers (i.e., FedEx, DHL,
 etc.); and that the correspondence shall be deposited with an express service carrier
 this same day in the ordinary course of business, to each addressee as set forth
 below.

- 1 ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set
2 forth below on this date before 5:00 p.m.
- 3 ☐ by placing the document(s) listed above in a sealed envelope with postage thereon
4 fully prepaid, in the United States mail at San Diego, California addressed as set
5 forth below.
- 6 ☐ by personally delivering the document(s) listed above to the person(s) at the
7 address(es) set forth below.

Attorneys for Plaintiff

8 Barron E. Ramos, Esq.
9 Attorney at Law
10 132 N. El Camino Real, Suite 303
11 Encinitas, CA 92024
12 (858) 349-6019
13 (760) 994-1354 (fax)

David R. Markham, Esq.
Clark & Markham
401 West A Street, Suite 2200
San Diego, CA 92101
(619) 239-1321
(619) 239-5888 (fax)

14 I am readily familiar with the firm's practice of collection and processing correspondence
15 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
16 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
17 motion of the party served, service is presumed invalid if postal cancellation date or postage
18 meter date is more than one day after date of deposit for mailing affidavit.

19 I declare under penalty of perjury under the laws of the State of California that the above
20 is true and correct.

21 Executed on March 21, 2008, at San Diego, California.

22 
23 Connie Garner

BARRON E. RAMOS
Attorney at Law, A Professional Corporation
Barron E. Ramos (State Bar No. 179620)
132 N. El Camino Real, # 303
Encinitas, California 92024
Telephone: (760) 274-6438
Facsimile: (760) 994-1354

CLARK & MARKHAM
David R. Markham (State Bar No. 071814)
R. Craig Clark (State Bar No. 129219)
James M. Treglio (State Bar No. 228077)
401 West "A" Street, Suite 2200
San Diego, CA 92101
Telephone: (619) 239-1321
Facsimile: (619) 239-5888

Attorneys for plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LEON ALPERT, an individual,
on behalf of himself, on behalf of all those
similarly situated, and on behalf of the general
public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a Delaware
corporation, and DOES 1 TO 100,

Defendants.

) Case No. GIC 881621

) **CLASS ACTION**

) **PLAINTIFF'S REPLY IN SUPPORT OF**
) **MOTION TO COMPEL FURTHER**
) **RESPONSES TO INTERROGATORIES**

) Date: April 4, 2008

) Time: 10:30 a.m.

) Dept: 63

) Judge: Hon. Luis R. Vargas

) Trial Date: None Set

) Case Filed: March 13, 2007

1 **I. INTRODUCTION**

2 TWC's Opposition argues that plaintiff's Motion to Compel is "premature," that plaintiff
3 lacks standing to bring a UCL claim and that the Motion is incomplete. TWC is wrong on all
4 counts.

5 Since this is a B&P Code section 17200 claim challenging TWC's statewide business
6 practices, the discovery is appropriate, whether a class is later certified or not. Similarly, TWC's
7 argument that plaintiff "lacks standing" is likewise wrong since plaintiff has pleaded injury and has
8 filed a declaration of an expert in opposition to TWC's MSJ that proves that injury.

9 TWC's argument that the Motion is "incomplete" because the Separate Statement does not
10 set forth each of TWC's responses is also wrong because CRC 3.1020© requires that the text of
11 each "response, answer, or objection" be provided as well as a statement for compelling further
12 responses "as to each matter *in dispute*." The text of the specific repeated objection to each
13 interrogatory, which is the "matter in dispute," has been provided verbatim. The Separate
14 Statement thus fully complies with CRC 3.1020©. Requiring plaintiff to provide the Court with
15 dozens of pages of superfluous text, when the matter in dispute is but one repeated blanket general
16 objection incorporated into each response, is nonsensical. Moreover, since TWC elected to *answer*
17 the interrogatories, notwithstanding its objections, TWC concedes the propriety of the questions -
18 but is hiding behind the one objection "in dispute" in this Motion so as to limit discovery to only
19 San Diego.

20 Finally, TWC admits that the answering party (TWC's San Diego division) is not the party
21 to whom the interrogatories were directed (TWC). Thus, TWC has arguably not answered any of
22 the interrogatories in dispute. Under these circumstances, a Separate Statement is not even
23 required to bring this motion.

24 Plaintiff's motion should be granted.

1 **II. PLAINTIFF'S MOTION IS NOT "PREMATURE"**

2 The First Amended Complaint (FAC) repeatedly makes plain that this is a statewide action,
3 not a San Diego and Desert Cities action. Likewise, plaintiff's discovery specifically incorporates
4 the defined term "RESIDENTS" which is defined as "occupants of properties during the CLASS
5 PERIOD that were part of a homeowners' association (HOA) *in California* with whom YOU had
6 entered into a 'Residential Bulk Services Agreement' to provide basic cable services to the HOA
7 members." (Emphasis added) See previously filed Decl. Ramos in Support of Motion, Exhibit A.
8 The term "RESIDENTS" is not limited to San Diego or the Desert Cities.
9

10 Code of Civil Procedure section 2017.010 provides that "any party may obtain discovery
11 regarding any matter, not privileged, that is relevant to the subject matter involved in the pending
12 action or to the determination of any motion made in that action, if the matter either is itself
13 admissible in evidence or appears reasonably calculated to lead to the discovery of admissible
14 evidence." "The scope of discovery is very broad." *Tien v. Superior Court* (2006) 139
15 Cal.App.4th 528, 535. The "expansive scope of discovery" (*Emerson Electric Co. v. Superior*
16 *Court* (1997) 16 Cal.4th 1101, 1108) is a deliberate attempt to "take the 'game' element out of trial
17 preparation" and to "do away with the sporting theory of litigation — namely, surprise at the
18 trial." *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.
19

20 In addition to the fact that discovery is "expansive" and broad, regardless of the type of
21 claim brought, this is B&P section 17200 case. As our Supreme Court has made plain, in proving
22 an unfair business practice violation, claimants are entitled to introduce evidence not only of
23 practices which affect them individually, but also similar practices involving other members of the
24 public who are not parties to the action. *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913,
25 929. Thus, whether this was a class action or not, a section 17200 claim is still one which
26 necessarily addresses unlawful, unfair and deceptive conduct as it impacts California consumers,
27
28

1 not merely the named plaintiff.

2 Moreover, under section 17200, price discrimination, as is specifically alleged here, is often
3 unlawful, "depending upon the context of the act and the intent of the perpetrator." *Id.* at 930.
4 Thus, to prove other members of the public throughout the State were likewise deceived, to analyze
5 whether TWC is engaging in alleged pricing discrimination statewide, to analyze the context of
6 those alleged acts, and to examine the intent of TWC with regard to all of these issues, plaintiff
7 must examine TWC's business practices not merely in San Diego, but throughout California. In
8 the absence of discovery, the plaintiff and the Court are simply unable to determine whether
9 TWC's business conduct in this State violates section 17200.
10

11 In its opposition, TWC argues that plaintiff's citation to *Perdue v. Crocker National Bank*
12 (1985) 38 Cal.3d 913, 929 does not support plaintiff's argument that claimants are entitled to
13 introduce evidence not only of practices which affect them individually, but also similar practices
14 involving other members of the public that are not parties to the action. Def.'s Memo at p.6:23-28.
15 TWC is wrong. "If plaintiff can show that the card or the manner in which it is presented to the
16 customer is deceptive and misleading, he can prove a cause of action for unfair competition. ...
17 [H]e need not show that he himself was misled; he need only prove that members of the public are
18 likely to be deceived." 38 Cal.3d at 929.
19

20 *Perdue* plainly stands for the proposition that a claim of deception rests on proving that
21 members of the public are likely to be deceived. Obviously, Mr. Alpert cannot show whether
22 members of the public were likely to be deceived by TWC's HOA pricing scheme unless he knows
23 what was represented by TWC to members of the public – not just in San Diego, but throughout
24 the State. Although flattered by TWC's argument, plaintiff's citation to *Perdue* was not original.
25 Indeed, it was taken directly from the Rutter's Practice Guide on the permitted scope of discovery
26 in B&P Code section 17200 claims.
27
28

III. PLAINTIFF HAS STANDING

TWC's argument that plaintiff has no standing to bring a UCL claim because he was not injured is also wrong. First, his injury is specifically and repeatedly pleaded in the First Amended Complaint (FAC). See, e.g., FAC, paras. 12, 13, 16, 17, etc. Second, evidentiary proof of that injury has also recently been submitted in the declaration of Wesley Nutten in opposition to TWC's MSJ. See Decl. Nutten in Opposition to MSJ at paras. 6, 7, 8. Mr. Alpert most certainly was overcharged by TWC under any analysis.

IV. PLAINTIFF'S MOTION SATISFIES CRC 3.1020

TWC's argument that plaintiff's Motion does not meet CRC 3.1020's format requirements is wrong. CRC 3.1020© requires that the text of each "response, answer, or objection" be provided as well as a statement for compelling further responses "as to each matter in dispute." The text of the specific repeated objection to each interrogatory, which is the "matter in dispute," has been provided verbatim. The Separate Statement thus fully complies with CRC 3.1020©.

Notwithstanding this compliance, TWC argues that plaintiff should be required to bury the Court in dozens of pages of superfluous text when the matter in dispute is but one repeated blanket general objection incorporated into each response. Nothing in CRC 3.2010 requires the moving party to set forth voluminous superfluous text that does not bear on the "matter in dispute." Here, the "matter in dispute" is solely the propriety of TWC's repeated general objection and its incorporation of that objection into each and every response so as to limit the responses to its San Diego division only.

Moreover, objections to an entire set of interrogatories, such as TWC has raised here, are not sustainable if any of the questions are proper. *Wooldridge v. Mounts* (1962) 199 Cal.App.2d 620, 628. In its responses, TWC asserted "General Objections" that are improper, that are incorporated into every single response, and that attempt to self-limit the responses by re-defining

1 TWC as follows: TWC "shall construe the terms 'YOU' and 'YOUR,' when used in the
2 interrogatories, to mean Time Warner Entertainment through its San Diego Division, which
3 operates in the San Diego and Desert Cities areas." See General Objection No. 3, Decl. Ramos,
4 Exhibit A. By answering all of the questions, but limiting all of its answers to only San Diego and
5 the Desert Cities, TWC concedes the propriety of the questions - but simply refuses to answer the
6 questions beyond the San Diego and Desert Cities areas.
7

8 If only part of an interrogatory is objectionable, the remainder of the interrogatory "shall be
9 answered." Code of Civ. Proc. section 2030.240(a). Since TWC did not rely on its objections to
10 refuse to answer for its San Diego division, it cannot do so now in refusing to answer for the
11 remainder of the State. Simply put, it is not that TWC failed to respond to plaintiff's
12 interrogatories based upon any other individually asserted objection(s) - TWC *did* answer the
13 interrogatories. However, TWC improperly limited its responses based upon one specific blanket
14 objection to the entire set. Since TWC answered the interrogatories, notwithstanding objections,
15 no other objection is at issue here. It is that sole blanket objection that limited TWC's response to
16 San Diego that is "in dispute."
17

18 TWC also argues that the Court "must" rule on each and every objection asserted by TWC
19 "separately" citing to the California Practice Guide. Def's Opp. at p.9:4-9. A review of the
20 specific citation in the California Practice Guide by TWC shows that the California Practice Guide
21 cites to no authority (case law or statute) for that specific proposition at all. Rather, the Practice
22 Guide, as does TWC, both cite to *Deaile v. General Telephone Co.* (1974) 40 Cal.App.3d 841, 851
23 which stands for the much narrower proposition that a "court may deny 'in toto' the motion to
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1 compel further answers where the questions are objectionable *in their entirety*.¹ Def.'s Opp. at
 2 p.9:4-9 (Emphasis added). TWC has made no such showing here. To the contrary, TWC, or more
 3 accurately, its San Diego division, has *answered* all of plaintiff's Special Interrogatories – but
 4 limited those responses to San Diego.

5
 6 TWC's argument and citation to *Deaile* unwittingly supports plaintiff's Motion since that is
 7 the sole question presented here: whether plaintiff's interrogatories are "objectionable in their
 8 entirety" because they inquire in TWC's business practices statewide, not just countywide. If a
 9 Motion to Compel can be denied "in toto" because interrogatories are "objectionable in their
 10 entirety," such a Motion can likewise be granted "in toto" if the sole question presented is whether
 11 they are *not* objectionable in their entirety - and that is the sole question presented here.

12 IV. TWC ADMITS IT HAS NOT ANSWERED THE DISCOVERY AT ALL

13
 14 Finally, TWC admits in its opposition that the defendant in this case, Time Warner Cable,
 15 Inc., has never responded to the propounded discovery. Def.'s Opp at p.1:23-28. Instead, TWC
 16 admits that only its San Diego "division" has responded. *Id.* The reason for TWC's self-imposed
 17 limitation on plaintiff's discovery is that, according to TWC, TWC is not the entity that "operates
 18 the cable business in San Diego." *Id.* at p.1:24-25.

19
 20 Since this is a statewide action brought under B&P Code section 17200, TWC's argument
 21 makes no sense. Plaintiff did not sue TWC's San Diego division – he sued TWC. TWC
 22 apparently does business in this state through many divisions, not merely its San Diego division.
 23 See e.g., TWC Decl. Rhodes at para. 2 -5. The interrogatories were directed to TWC and relate to
 24

25
 26 ¹ Plaintiff could find no authority to support TWC's position that a moving party must
 27 address, and a court must rule, on each and every objection made, even if those objections are not
 28 germane to the narrow issue presented in a motion to compel – here, the propriety of one specific
 objection. *Deaile* most certainly does not stand for such a proposition. Moreover, the burden of
 justifying objections is on the responding party. *Coy v. Sup. Ct.* (1962) 58 Cal.2d. 210, 220-221.

1 its conduct statewide, not its conduct in any one particular division.

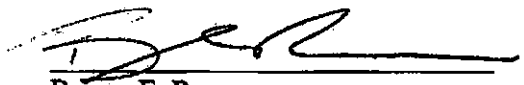
2 Code of Civ. Proc. section 2030.210 provides that: "The party to whom interrogatories have
3 been propounded shall respond..." TWC admits in its Opposition that the party that answered the
4 discovery is not the party to whom it was directed.² On this basis alone, the Motion should be
5 granted.
6

7 **V. CONCLUSION**

8 Objections to an entire set of interrogatories, such as TWC has raised here, are not
9 sustainable if any of the questions are proper. The Court has the complete and verbatim list of the
10 interrogatories in question here as well as the specific repeated objection in dispute. TWC, or more
11 accurately, its San Diego division, answered *all* of the interrogatories but limited those responses to
12 its San Diego division. That limitation is improper since this case is based upon TWC's conduct
13 throughout this State, not just in San Diego, and because this is a B&P Code section 17200 claim -
14 whether a class is ever certified or not.
15

16 Plaintiff's Motion should be granted.

17
18 Dated: March 21, 2008


Barron E. Ramos
Attorneys for plaintiff

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27 ² Further undermining TWC's separate statement "format" arguments, unlike the situation
28 where an unsatisfactory response is given, here, where no response is given by a party at all, there
is no requirement to even *file* a separate statement. CRC 3.1020(b).

BARRON E. RAMOS

Attorney at Law, A Professional Corporation
Barron E. Ramos (State Bar No. 179620)
132 N. El Camino Real, # 303
Encinitas, California 92024
Telephone: (760) 274-6438
Facsimile: (760) 994-1354

CLARK & MARKHAM

David R. Markham (State Bar No. 071814)
R. Craig Clark (State Bar No. 129219)
James M. Treglio (State Bar No. 228077)
401 West "A" Street, Suite 2200
San Diego, CA 92101
Telephone: (619) 239-1321
Facsimile: (619) 239-5888

Attorneys for plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

LEON ALPERT, an individual,
on behalf of himself, on behalf of all those
similarly situated, and on behalf of the general
public,

Plaintiffs,

v.

TIME WARNER CABLE, INC., a Delaware
corporation, and DOES 1 TO 100,

Defendants.

) Case No. GIC 881621

) CLASS ACTION

) **PLAINTIFF'S REPLY IN SUPPORT OF**
) **RENEWED NOTICE OF MOTION AND**
) **MOTION TO COMPEL FURTHER**
) **RESPONSES**

) Date: April 4, 2008

) Time: 10:00 a.m.

) Dept: 63

) Judge: Hon. Luis R. Vargas

) Trial Date: None Set

) Case Filed: March 13, 2007

In its Opposition, TWC does not dispute that TWC wrongly argued that the defect in plaintiff's previous notice was "jurisdictional" - it was not. Nor does TWC dispute the fact that it moved against plaintiff's previous motion by arguing that TWC's objections had merit and by asking the court to grant plaintiff's requested production of documents. Since plaintiff's previous motion specifically identified the alternative basis for relief and addressed the merits of the document production request and TWC's objections, the previous motion fully supported the alternative basis for relief requested in the current motion to Compel.

TWC now also admits that the defendant in this case has never answered the discovery at all. Rather, TWC's San Diego "division" has answered. Code of Civ. Proc. section 2031.210 requires that the party to whom discovery is directed respond, not some other entity. Failure of a party to respond enables the requesting party to bring a motion compel at any time - there is no statutory time limit.

Plaintiff's Renewed Motion to Compel is proper. The Court's previous denial of the motion was "without prejudice" and the purported defect in the previous motion has been cured. TWC's failure to respond to plaintiff's discovery is without justification.

As a preliminary matter, the Court is free to revisit any of its previous rulings within a reasonable period of time, and, by denying the previous motion "without prejudice," specifically left the door open to do just that. Thus, plaintiff immediately renewed his Motion to Compel to file the Notice of Motion which failed to specifically identify the alternative ground set forth in the moving papers.

An omission in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought. *Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 807-808; *Geary Street, L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1200.

1 Even though the notice of motion fails to state a particular ground for
 2 the motion, where the notice states, as here, that the motion is being
 3 made upon the notice of motion and accompanying papers and the
 4 record, and these papers and the record support that particular
 5 ground, the matter is properly before the court and the defect in the
 6 notice of motion should be disregarded.

7 *Savage v. Smith* (1915) 170 Cal. 472, 474

8 Plaintiff's previous moving papers made clear the grounds for the relief sought, both as a
 9 Motion to Compel Compliance and a Motion to Compel Further Responses. Page 3 of plaintiff's
 10 previous Motion to Compel stated that: "To the extent Time Warner takes the position that it has
 11 not agreed to produce said documents, notwithstanding its Response that it would produce the
 12 documents, this Motion can and should be considered a Motion to Compel Further Responses
 13 under CCP section 2031.310." The Motion then went on to address (i) the propriety of TWC's
 14 objections and (ii) why the documents were sought and relevant. Thus, the moving papers
 15 supported the alternative ground for bringing the Motion.

16 There was no surprise to TWC in the nature of the alternative motion. Indeed, TWC's
 17 Opposition herein is silent in response to plaintiff's argument that TWC defended its objections in
 18 the previous motion. See, e.g., TWC's Opp to Plaintiff's Original Motion to Compel at p.13-14.
 19 TWC's arguments plainly indicated that TWC knew all along it was defending against a Motion to
 20 Compel, not just a Motion to Compel Compliance. In fact, TWC additionally took the specific
 21 position that plaintiff's request for production of documents between TWC and HOAs outside of
 22 San Diego was irrelevant and "improper." See e.g., TWC's Opp to Plaintiff's Original Motion to
 23 Compel at p.11:2, 11:7.

24 Standing on objections and claiming a request is irrelevant and "improper" is a defense to a
 25 motion to compel, not a motion to compel compliance. TWC's election to make these arguments
 26 in its original opposition to plaintiff's motion undermines any argument now that TWC did not
 27 address plaintiff's alternative ground in his motion and that this motion is anything "new."

1 Plaintiff's original motion plainly stated the alternative ground and TWC defended against that
2 alternative ground.

3 **III. TWC'S CITED AUTHORITY UNDERMINES TWC'S POSITION**

4 TWC's citation to *Northridge Financial Corp. v. Hamblin*, 48 Cal.App.3d 819 (1975) for
5 the proposition that this Court lacks jurisdiction to hear a renewed motion makes no sense. First,
6 *Northridge* did not involve a renewed motion predicated on the correction of a defect in a notice.
7 Indeed, the issue of notice was not addressed at all by the *Northridge* court.

8 Second, *Northridge* did not involve a renewed motion based upon a previous court order
9 denying a motion "without prejudice." As the *Northridge* court observed:

10 [A]ppellate courts have always recognized that a court has power, on
11 a subsequent motion, to reconsider its prior decision ... (Citations.)

12 In such cases the subsequent motion is considered as a renewal of the
13 previous motion. (Citations.). . . " *Id.* at 825.

14 Under Code of Civ. Proc. section 473, which is at issue in *Northridge*, a court may
15 reconsider a previous order as long as the request to do so is brought within six (6) months. Code
16 of Civ. Proc. section 473(b). "Application for this relief .. shall be made within a reasonable time,
17 in no case exceeding six months... after the ... order ... was taken." Code of Civ. Proc. section
18 473(b). Thus, to the extent TWC is arguing that section 473 controls, this motion to renew is,
19 again, timely since it was March 13, 2008 (only 2 weeks ago) that the Court issued its Order
20 denying the original motion. TWC's nonsensical reading of the *Northridge* decision such that no
21 party could ever file a renewed motion, except within the time period prescribed for the *original*
22 motion, would render Code of Civ. Proc. section 473's six month time limit meaningless and
23 effectively eliminate a court's ability to revisit its own decisions.

24 **IV. PLAINTIFF COMPLIED WITH CCP 1008**

25 TWC's argument that plaintiff did not file a declaration in support of his renewed motion as
26 required by Code of Civ. Proc. section 1008(b) is wrong. Def.'s Memo at p.7, fnnt 2. Plaintiff's
27 counsel did file such a declaration which clearly sets forth the bases for the renewed motion. Decl.

1 Ramos at para. 4 ["On February 22, 2008, this Court denied plaintiff's Motion to Compel
2 Compliance and alternative Motion to Compel "without prejudice." The denial was due to an *error*
3 *in the Notice* which did not identify the alternative basis for the Motion, even though the
4 supporting papers and record did identify that alternative basis."] (Emphasis added)

5 **V. TWC ADMITS IS HAS NOT ANSWERED THE DISCOVERY**

6 Finally, TWC admits in its opposition that the defendant in this case, Time Warner Cable,
7 Inc., has never responded to the propounded discovery. Def.'s Opp at p.8:4-16. Instead, TWC
8 admits that only its San Diego "division" has responded. *Id.*

9 Code of Civ. Proc. section 2031.210 provides that: "The party to whom an inspection
10 demand had been directed shall respond..." TWC admits in its Opposition that the party that
11 answered the discovery is *not* the party to whom it was directed. Unlike the situation where an
12 unsatisfactory response is given, here, where no response is given at all, there is no statutory time
13 limit or deadline for filing a motion to compel, further undermining TWC's "jurisdictional"
14 argument.

15 **VI. CONCLUSION**

16 Plaintiff's Renewed Motion to Compel is proper and should be granted.

17 Dated: March 21, 2008

18 
19 Barron E. Ramos
20 Attorneys for plaintiff
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PROOF OF SERVICE

I am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 132 N. El Camino Real, # 303, Encinitas, California 92024.

On March 27, 2008, I served the following documents:

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL FURTHER RESPONSES TO INTERROGATORIES

PLAINTIFF'S REPLY IN SUPPORT OF *RENEWED* MOTION TO COMPEL FURTHER RESPONSES

on the parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

Jeffrey M. Shohet
Julie L. Hussey
Carrie S. Dolton
DLA PIPER US LLP
401 B Street, Suite 1700
San Diego, CA 92101-4297
Facsimile: (619) 764-6644

*Attorneys for Time Warner Entertainment-
Advance NewHouse Partnership, A New York
General Partnership, Through its San Diego
Division d.b.a. Time Warner Cable*

X (BY UPS *Overnight Delivery*) I placed each such sealed envelope, with postage thereon fully prepaid, for collection and mailing via UPS overnight delivery at 132 N. El Camino Real, # 303, Encinitas, California 92024, following ordinary business practices.

(BY FACSIMILE) I transmitted the above-listed document to the party listed above via facsimile. The transmission was reported complete and without error. The telephone number of the facsimile machine I used was (760) 274-6438.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Encinitas, California on March 27, 2008.


Barron E. Ramos